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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-62

MASHPEE TRIBE, *Petitioner,*

v.

NEW SEABURY CORP., et al., *Respondents.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 79-

MASHPEE TRIBE, *Petitioner,*

v.

NEW SEABURY CORP., et al., *Respondents.*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Mashpee Tribe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 13, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 592 F.2d 575 (1st Cir. 1979). The opinion of the District Court for the District of Massachusetts on the issues raised by this petition is reported at 447 F.Supp. 940 (D.Mass. 1978). An earlier opinion of the District Court on other issues is reported at 427 F.Supp. 899

(D.Mass. 1977). Each opinion is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was issued on February 13, 1979. On May 1, 1979, Mr. Justice Brennan granted petitioner's application for an extension of time in which to petition for certiorari through July 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In an action to recover Indian tribal land alienated in violation of the Nonintercourse Act (25 U.S.C. 177), did the trial court err by instructing the jury that plaintiff tribe had the burden of proof on all issues, where a prima facie case of prior ownership or possession was shown?

2. Where the Court of Appeals found the trial court's investigation of a threat to a juror was inadequate, should a new trial have been ordered?

3. Was dismissal of plaintiff's complaint for recovery of Indian tribal land improperly based on abandonment of tribal existence?

   A. Did the courts below incorrectly define "tribe" for purposes of the Nonintercourse Act (25 U.S.C. 177)?

   B. Did the trial court incorrectly instruct the jury that a tribe can abandon its existence by adoption of "English forms" and "English labels"?

   C. Were the jury's special verdicts irreconcilably inconsistent?

   D. Did the trial court err by failing to defer to the Department of the Interior to make the initial determination whether plaintiff was a tribe?

STATUTES INVOLVED

United States Code, Title 25:

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

§ 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

Petitioner Mashpee Tribe brought this action to recover tribal land in the Town of Mashpee, Massachusetts, which was alienated between 1834-1870 without federal consent. The basis for the action is the Indian Nonintercourse Act, 25 U.S.C. 177, which voids conveyances of tribal land not made pursuant to federal authority. Defendants are the class of adverse claimants to the same land, represented by parties designated by order of the District Court. The District Court sustained its jurisdiction under 28 U.S.C. 1331. App. 55a.

The District Court denied defendants' motions to dismiss, App. 54a-61a. Defendants' answer controverted the complaint's allegations that plaintiff was an Indian tribe at relevant times. The District Court ordered a separate trial on the issues of tribal existence and original ownership of the subject land, reserving other issues, and scheduled it to begin in October 1977.

Plaintiff had earlier asked the Department of the Interior to determine that plaintiff is an Indian tribe. At first no action was taken on the request, but prior to trial the Department announced that it was prepared to entertain plaintiff's request. Plaintiff then moved for a delay in the trial pending the Interior Department's determination, but the District Court denied the motion and proceeded to trial.

At the conclusion of the evidence, the District Court submitted a series of special interrogatories to the jury on the question of tribal existence. The jury was asked to determine whether plaintiff had proved that it was an Indian tribe when the action was filed in 1976; whether the tribe had existed in 1870, 1869, 1842,

1834, or 1790; and whether the Tribe had continuously existed since those dates. The jury found that the Tribe had existed in 1834 and 1842 but not on the other dates.

After the verdicts, the District Court heard arguments on whether judgment should be entered. Following argument but before entry of judgment, the court was advised by a member of the bar that a member of the jury who resided near Mashpee had received an anonymous, threatening telephone call about the case during the trial. The court summoned the juror, who admitted receiving the threat and other anonymous calls which he attributed to the trial. Based on strenuous objections by defendants' counsel, the court refused to ask the juror whether he had told other jurors about the call or discussed it with them and refused to ask other jurors about the matter or whether they had received threats.

In March 1978 the District Court issued its opinion and judgment. App. 37a-53a. The court held that the jury's verdicts meant that plaintiff had been a tribe within the protection of the Nonintercourse Act in 1842, when most of the disputed land was aliented without federal approval. App. 48a. The court also held that the finding that plaintiff was not a tribe in 1976, when the action was filed, meant plaintiff lacked "standing" to seek a remedy for the violation.[1] The action was accordingly dismissed.

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[1] The District Court dismissed based on "standing", and the Court of Appeals said that "it is undisputed" that "standing" is the proper way to denominate the issue. App. 2a. We disagree and believe that the basis was lack of cause of action to redress the demonstrated illegal seizure of tribal lands. Plaintiff manifestly had standing. See, Data Processing Service v. Camp, 397 U.S. 150 (1970).

On appeal plaintiff raised the issues set out in the Questions Presented in this petition. The Court of Appeals affirmed the District Court's dismissal. App. 1a-36a.

FACTS

Both courts below recognized that the jury's verdicts could be rationalized only as an implicit finding that the Mashpee Tribe voluntarily abandoned its existence between 1842 and 1869. App. 25a-30a, App. 50a-52a.[2] For this reason, the evidence for that period is pertinent to the issues raised here. Many background facts are recited in the District Court's opinion. App. 39a-47a.

Early grants to the land in question were made to "the South Sea Indians and their children," being the Indians already occupying "the area surrounding the Indian village of Mashpee." App. 40a. In 1723 Mashpee was organized as "a permanent Indian plantation, in which the land was to be held in common, entailed, and with a restraint on alienation into the indefinite future." App. 41a. In 1746 the Massachusetts General Court (legislature) imposed a guardianship over the Indians. Upon petition to King George personally carried to London by one of the Indians, the guardianship was lifted and a measure of self-government granted the Mashpees. App. 41a.

After the Revolutionary War, in which many Mashpee men were killed fighting for the United States, Massachusetts reimposed a system of rule by outside guardians over the Mashpees. In 1833, the Indians

[2] This was so because the trial court repeatedly instructed the jury that plaintiff must prove that it was continuously a tribe at all times between the dates specified. Tr. 40-6, 9, 63.

petitioned the General Court for relief from guardianship, and in 1834 the General Court established the District of Mashpee with local self-government. App. 41a-42a.

In 1842 the General Court allotted most of the tribal common land to individual residents in restricted fee. App. 43a. In 1869 the Commonwealth convened a meeting in Mashpee to discuss further legislation removing all restrictions on land alienation. The Indians voted against it, but the General Court passed it anyway. The following year another act established the Town of Mashpee and transferred the remaining tribal common land to it.

The present Mashpee Tribe consists of Indians descended from the proprietors of Mashpee who owned and occupied the land when it was illegally alienated. App. 44a. The Town of Mashpee remained a predominantly Indian town until the early 1970's. App. 44a. Since losing control of the Town Council, the Tribe has established a separate Tribal Council to carry on administrative business. The Tribal Council has been recognized by the Commonwealth of Massachusetts as the Tribe's governing body. App. 46a.

REASONS FOR GRANTING THE WRIT

I. The Issues Are Important

This petition raises three questions meriting the exercise of this Court's jurisdiction. First is the nature of the Indian entities within the statutory protection for the lands of "any . . . tribe of Indians" in the Nonintercourse Act (25 U.S.C. 177), and the procedure for answering that question. This is an issue likely to recur.[3]

[3] The statute has been interpreted in several reported lower court decisions in recent years. *See*, United States v. Southern Pac.

Another aspect of this important statute was reviewed in *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974). The issue here is no less significant.

The second issue involves this Court's supervisory responsibilities over the conduct of jury trials by the federal district courts. The Court of Appeals found that the District Court mishandled a threat to a juror yet refused to reverse.

The third reason the Court should exercise its jurisdiction is that the Court of Appeals' interpretation of 25 U.S.C. 194 is contrary to this Court's subsequent reading of the statute in *Wilson* v. *Omaha Indian Tribe,* Nos. 78-160, 161, 47 U.S.L.W. 4758 (June 20, 1979).

II. The Burden of Proof Was Improperly Placed On Plaintiff on the Issue Crucial To Dismissal.

The District Court instructed the jury that plaintiff had the burden of proof in all respects. "The defendant [sic] does not have any burden." Tr. 40-8. This and like instructions erroneously required plaintiff to prove that it had continuously existed as a tribe since its lands were alienated in violation of the Nonintercourse Act; that it had not voluntarily abandoned its existence; and that the tribe continued to exist notwithstanding the suppression of tribal activity caused by the illegal acts.

Transp. Co., 543 F.2d 676 (9th Cir. 1976)); Joint Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Oneida Indian Nation v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977); Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F.Supp. 798 (D.R.I. 1976). Other cases pending in the lower courts do not involve reported opinions.

The Court of Appeals reviewed the burden of proof issue both under 25 U.S.C. 194 and under general evidence law and sustained the District Court. App. 21a-25a. Both rulings were erroneous.[4] The ruling on 25 U.S.C. 194 in particular was contrary to the subsequent interpretation of that statute by this Court in *Wilson* v. *Omaha Indian Tribe,* Nos. 78-160, 161, 47 U.S.L.W. 4758 (June 20, 1979).

The foundation to invoke Section 194 was clearly satisfied. The evidence of both sides showed that a community of Mashpee Indians had long occupied the land in question, and that Massachusetts had recognized in these Indians a special Indian communal form of ownership of the lands (termed a proprietorship), which was confined to Mashpee Indians and their descendants without the right of alienation. App. 41a. The jury also found that the Mashpee Indians comprised a tribe within the Nonintercourse Act in 1834 and 1842 at the time most of the Tribe's communal holdings were taken without federal approval. Plaintiff therefore clearly showed "previous possession or ownership" of the land in question. *Wilson* v. *Omaha Indian Tribe, supra.*

Despite this evidence the courts below declined to apply Section 194 to the issue of voluntary abandonment of tribal existence, ruling that the statute could have no application until some later stage in the proceedings. App. 22a-23a. This was contrary to this Court's holding in *Wilson* v. *Omaha Indian Tribe, supra. Wilson* rejected a similar holding by the Dis-

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[4] The Court of Appeals suggested that plaintiff might not have raised the burden of proof question except under 25 U.S.C. 194. That is not correct; plaintiff made a general objection to the burden of proof instructions without reference to Section 194. Tr. 40-69. When shifting to Section 194, trial counsel began, "In the alternative . . ." Tr. 40-70.

trict Court in that case that the foundation "involves the merits of the issue on which this case turns. Slip. op. at 13.[5] Since plaintiff here showed both prior possession and ownership of the land, the fact issue of subsequent voluntary disbanding of the tribe (untainted by the illegality itself) should have gone to the jury with an instruction that defendants had the burden of proof. At the very least this error requires a remand to the Court of Appeals to reconsider its decision in light of *Wilson*.

[5] Application of Section 194 is at least as appropriate here as in *Wilson*, because the substantive basis for this action, 25 U.S.C. 177, was enacted as part of the same statute as 25 U.S.C. 194. 4 Stat. 730, 733 §§ 12, 22 (1834). The Court in *Wilson* cited a House of Representatives Report implying that the original drafters of the 1834 Act intended it to apply only in "Indian country." Slip. op. at 12. But the Act was later amended on the Senate floor to preserve the 1802 Trade & Intercourse Act (including the predecessors of 25 U.S.C. 177 and 194) for all "tribes residing east of the Mississippi." 4 Stat. 734, § 29.

Also, only some sections of the 1834 Act were by terms applicable in "Indian country"; 4 Stat. 729-33, §§ 2-8, 10, 16-21, 23-25. Other sections had no term of location and applied everywhere; these include the sections at issue here. 4 Stat. 730-33, §§ 9, 11-15, 22. Interpretations of the Act have consistently reflected this division. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), this Court held the Nonintercourse Act (§ 12 of the 1834 Act) applicable "in all of the States, including the original 13," rejecting the argument of the State of New York to the contrary. The Court reached a like conclusion in The New York Indians, 72 U.S. (5 Wall.) 761, 771 (1867).

Codifications of the 1834 Act have reflected the same understanding. The compilers of the Revised Statutes of 1873 placed the surviving "Indian country" sections of the 1834 Act under Tit. 28 ch. 4, titled "Government of Indian Country." The general sections, including 12 and 22, were placed under Tit. 28 ch. 3, titled "Government and Protection of Indians." See, R.S. 2116, 2126. The present Title 25, U.S. Code is organized in the same way. The surviving "Indian country" sections from the 1834 Act were placed in Chapter 6, "Government of Indian Country and Reservations." The general sections, including 177, and 194, appear in chapter 5, "Protection of Indians."

III. The Trial Court's Failure To Investigate Adequately A Threat To A Juror Requires A New Trial.

The Court of Appeals concluded that the trial court's investigation of a threat to a juror "was terminated too soon," App. 30a, and that defendants' "over-zealous objections" prevented an "obviously proper question" of the errant juror (whether he had discussed the threat with other jurors). App. 31a, 33a. Yet the court sustained the trial court's action. Petitioner submits that this conclusion was based on sheer expediency and is improper. It is hard to believe that the same conclusion would have been reached had the trial lasted only a few days. But it was defendants who demanded a jury trial and who demanded that investigation of the threat be prematurely terminated. A new trial was the only proper course in these circumstances.[6]

An added reason for particular care in investigating the threat was the racial innuendo injected into the trial. As the opinions below note, both white and black persons had married into the Mashpee Tribe during the 18th and 19th Centuries. App. 41a. White intermarriage was largely ignored, but counsel for defendants argued (to the all-white jury) that black intermarriage made the Mashpees' proper racial identification black instead of Indian. See, *e.g.*, Tr. 2-65. (. . . there is nothing wrong with being black.) In these circumstances, particular caution regarding jury threats was demanded.

[6] There is no precedent in this Court or the lower courts supporting affirmance of an admittedly inadequate investigation of a threat to a juror.

IV. Dismissal Based On Abandonment of Tribal Existence Was Erroneous.

A. The courts below incorrectly defined tribe for purposes of the Nonintercourse Act.

The trial court gave the jury a restrictive definition of "tribe of Indians" for purposes of the Nonintercourse Act,[7] a definition which few tribes could meet. Nothing in the history and purpose of the Act justifies that definition.

By the successive Nonintercourse Acts beginning in 1790, Congress reserved to itself the sole authority to extinguish tribal property rights. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974). The Acts in force between 1790-1834 by their terms protected lands held by "Indians" as well as tribes.[8] In 1833 Attorney General Taney held that lands reserved to individual Indians from treaties of cession were inalienable under the 1802 Nonintercourse Act. 2 Op. A.G. 587 (1833). Within a year "and perhaps in consequence thereof," Congress removed the protection for lands held by individual Indians.[9] See, *Jones* v. *Meehan,* 175 U.S. 1, 12-13 (1899). Since 1834 the Nonintercourse Act has protected the lands of any "nation or tribe of Indians." 25 U.S.C. 177.

As the Court's review of the matter in *Jones* v. *Meehan* makes clear, Congress did not intend to use a narrow and exclusive definition of tribe in the statute. To

[7] The trial court admitted that its definition was especially narrow by indicating that plaintiff might be a tribe for other purposes. App. 52a n. 7 .

[8] 2 Stat. 143, § 12 (1802); 1 Stat. 746, § 12 (1799); 1 Stat. 472, § 12 (1796); 1 Stat. 330, § 8 (1793); 1 Stat. 138, § 4 (1790).

[9] 4 Stat. 730, § 12 (1834).

the contrary, all Indian lands were divided into two groups, individually held and tribally held. Clearly the latter encompassed all lands held communally in the tribal manner.

Contrary to the purpose of the statute, the trial court imposed detailed and complex requirements that plaintiff must satisfy to be a "tribe" within the Act. One particularly specialized element was the requirement that plaintiff prove the trial court's view of appropriate "leadership or government" in order to be a tribe.

The Court of Appeals' opinion purported to quote all the trial instructions on this subject. App. 10a-13a. Inexplicably the court omitted one to which plaintiff had particularly objected:

> Again, the standard is a leadership which exercised control over the internal affairs of the group . . . that there was controlling leadership of significant elements in the lives of the people. (Tr. 40-59).[10]

This was soon followed by an instruction the Court of Appeals did quote requiring proof of "a leadership that is governing the conduct, the lives of the people in some significant way," App. 12a, and by the requirement that plaintiff prove "leadership that is passed on in some orderly way." App. 11a.

These requirements were extrapolated by the courts below from this Court's definition of tribe in a very different context in *Montoya* v. *United States,* 180 U.S.

[10] The omission of this instruction may explain the Court of Appeals' statement that plaintiff's argument to it that the trial court had required "binding authority" was "not true." App. 13a. We fail to perceive any meaningful distinction between "controlling leadership" and "binding authority."

261, 266 (1901). We do not dispute that definition, but we think it was seriously misapplied, particularly on the so-called "requirement" of leadership. *Montoya* did not involve proof of tribal existence; the issue was whether a tribe should be held liable under the depredations laws for errant members' actions under a *respondeat superior* theory. In particular, the question was whether a dissident band responsible for the wrongs had become separated from the tribe. The Court's mention of a group "under one leadership or government" in context meant one as opposed to two.[11]

We do not dispute that "leadership" in the broad sense is implicit in group ownership of property and other actions, and we did not contend that the jury could not be told that leadership is an indicium of tribal status. But we did and do object to the trial court's particular, restrictive and ethnocentric view of the term, particularly in light of the jury's probable preconceptions on the subject.

It is apparent that these requirements are completely unrelated to the 1834 statutory purpose retaining protection of communal lands while relinquishing it over individual holdings. Tribe must be interpreted broadly in light of that purpose.

It is also apparent that few tribes could meet that standard.[12] As this Court recently noted in *Washington* v. *Fishing Vessel Ass'n,* —— U.S. —— (July 2, 1979), some of the aboriginal bands in the Pacific Northwest

[11] The *Montoya* definition was applied to a Nonintercourse Act case in United States v. Candelaria, 271 U.S. 432, 433 (1926). But *Candelaria* involved a one-sentence conclusion and said nothing about "leadership" or any other detailed requirement.

[12] The trial court expressly recognized that fact. Tr. 38-190.

"had little or no tribal organization," and territorial officials "took initiative in aggregating certain loose bands into the designated tribes and even appointed many of the chiefs who signed the treaties." Slip. op. at 5, 5 n. 5.

The trial court imposed its restrictive definition of tribe based on its view that plaintiff was seeking "a very radical remedy." Tr. 38-191. See also App. 52a, n. 7 ("extraordinary remedy"). But the remedies for violations of the Nonintercourse Act are spelled out specifically by Congress—all conveyances in violation of the Act are without "any validity in law or equity." It is a fundamental rule of the separation of powers that it is for Congress to establish policy and for the courts to enforce that policy, not revise it. *TVA* v. *Hill,* 437 U.S. 153 (1978). The policy of the Nonintercourse Act has consistently been to prevent extinguishment of Indian property rights other than by Congress. It is for Congress, not the courts, to rectify mistakes, balance equities and determine the Indians' just requirements.[13]

B. The trial court erred by instructing the jury that it could find that the tribe had disbanded if the tribe had adopted "English Forms" and "English Labels".

As already pointed out, the judgment of dismissal was based on an implicit jury finding that the Mashpee Tribe voluntarily disbanded after its communal lands were unlawfully alienated. The trial court's instructions on abandonment of tribal status were therefore crucial. As the Court of Appeals acknowledged, App. 17a, 20a, n. 8, the trial court instructed the jury that the

[13] That Congress can and will do that with respect to Nonintercourse Act issues involving takings occurring many years ago is shown by 25 U.S.C. 1701-1712 (Supp. 1979).

tribe could terminate through social or cultural assimilation of "English forms" and "English labels." Under these and other instructions on the subject, a tribe could disband even though its members retained a tribal organization, identified themselves as Indians with a common tribal ancestry and held communal lands. No previous authority of continuing validity has held that an Indian tribe had voluntarily abandoned its existence. To the contrary, integration and assimilation have expressly been held insufficient to destroy tribal rights.[14]

C. The jury's verdicts were irreconcilably inconsistent.

Validity of the jury's verdict depends on whether the evidence supports the implicit finding that the Mashpee Tribe voluntarily disbanded between 1834 and 1869. App. 26a. The Court of Appeals sustained the verdict based on several factors, at least two of which were clearly improper. Most clearly wrong was the court's reliance in two contexts on the division of the tribe's common land. App. 27a-28a. Alienation of tribal land, no matter how "voluntary," is the very event absolutely prohibited by the Nonintercourse Act without federal approval. The Court of Appeals erred in holding that illegal acts can be the primary basis to sustain a jury verdict that a tribe dissolved "voluntarily".

The second error was the Court's reliance on the desire expressed by some individuals in an 1869 hearing to become citizens. App. 27a-28a. It is well settled that

[14] United States v. Holliday, 70 U.S. (3 Wall.) 407, 408-10, 417-20 (1866); The Kansas Indians, 72 U.S. (5 Wall.) 737, 756-57 (1867); Joint Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975); Confederated Salish & Kootenai Tribes v. Moe, 392 F.Supp. 1297, 1315 (D.Mont. 1975), *aff'd*, 425 U.S. 463 (1976).

Indian citizenship is not incompatible with tribal membership. *E.g., United States* v. *Nice,* 241 U.S. 591, 597-601 (1916).

If these erroneous factors are not considered, the verdicts cannot stand. The evidence clearly showed continuity of tribal organization between 1842 and 1869 (as the Court of Appeals noted, App. 27a). There was no proper evidence to justify a finding of voluntary dissolution untainted by the violation of the Act itself.

D. The trial court improperly failed to defer the initial decision on tribal existence to the Department of the Interior.

This Court has repeatedly held that federal district courts should defer to administrative agencies on issues where the agencies "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" and to secure uniformity and consistency in the conduct of business entrusted to the agency. *Weinberger* v. *Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 654 (1973); *see also, United States* v. *Western Pac. R.,* 352 U.S. 59, 63 (1956). This doctrine has been applied to a case involving federal interests in land and at the instance of the United States as plaintiff. *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 338 (1963).

The Court of Appeals rejected application of this doctrine primarily on the ground that the Interior Department had no expertise in recognizing Indian tribes. App. 4a-7a. This premise was clearly in error. Many statutes have required the Department to determine what groups constitute tribes for various purposes. One comprehensive example of recent vintage is the Indian Reorganization Act of 1934, 25 U.S.C. 461-479.

The Act required the Department to determine what "Indian tribe or tribes" were entitled to organize under the Act, 25 U.S.C. 476. *Cf., United States* v. *John,* 437 U.S. 634 (1978). The Department has particular expertise in the correct meaning of "tribe" respecting land restrictions, since it has long administered the many statutes controlling these matters. *E.g.,* 25 U.S.C. 81, 177, 323-28, 398, 415. The sole reason for the Department's tardy involvement in the Mashpee situation was its prior view that tribes in Massachusetts and "unrecognized" tribes were not under its responsibility, rejected in *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 670 (1974) and *Joint Council of the Passamaquoddy Tribe* v. *Morton,* 528 F.2d 370 (1st Cir. 1975), respectively. See also App. 56a-57a, for the District Court's holding on the latter issue.

An added reason why the matter should have been submitted to the Department is that no conclusive decision on the title questions at issue in this case is possible until the United States is bound. *United States* v. *Candelaria,* 271 U.S. 432, 444 (1926). As a practical matter a decision by the Interior Department would assist the courts, bind the United States, and insure consistency with like decisions elsewhere.

CONCLUSION

For the reasons stated, the writ should be granted. The case should be set for briefing and argument, or in the alternative it should be remanded to the Court of Appeals for reconsideration in light of *Wilson* v. *Omaha Indian Tribe, supra.*

Respectfully submitted,

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July 1979

APPENDIX

APPENDIX

592 F.2d 575 (1979)

MASHPEE TRIBE, *Plaintiff, Appellant,*

v.

NEW SEABURY CORP. et al., *Defendants, Appellees.*

MASHPEE TRIBE, *Plaintiff, Appellee,*

v.

NEW SEABURY CORP. et al., *Defendants, Appellants.*

MASHPEE TRIBE, *Plaintiff, Appellee,*

v.

NEW SEABURY CORP. et al., *Defendants, Appellees,*

Matthew B. Connolly, etc., *Defendant, Appellant.*

Nos. 78-1272 to 78-1274.
United States Court of Appeals, First Circuit.

Argued Nov. 8, 1978.
Decided Feb. 13, 1979.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

COFFIN, Chief Judge.

Plaintiff, denominating itself the Mashpee Tribe, claims to be a tribe of Indians that has lived in and around the town of Mashpee, Massachusetts, continuously since time immemorial. The suit is based on the Indian Nonintercourse Act which was first passed in 1790 and exists now as 25 U.S.C. § 177:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any In-

dian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

Plaintiff claims that its tribal land was taken from it between 1834 and 1870 without the required federal consent. This suit, filed August 26, 1976, against a defendant class representing landowners in the town of Mashpee, seeks recovery of those lands.

Defendants answered the complaint, in part, by denying that plaintiff is or was a tribe. It is undisputed that if plaintiff was not a tribe in 1976 it lacked standing to bring this suit and that if not a tribe at the critical times in the nineteenth century it was not protected by the Act. The district court severed the issue of plaintiff's tribal status for a separate, preliminary trial. Before trial plaintiff moved for a continuance pending the Department of the Interior's determination whether or not to declare plaintiff a federally recognized tribe. The court denied the motion, and trial began October 17, 1977. The trial lasted 40 days and was submitted to the jury on special interrogatories January 4, 1978. The jury returned its verdict on January 6. The interrogatories, together with the jury's answers, were as follows:

"1. Did the proprietors of Mashpee, together with their spouses and children, constitute an Indian tribe on any of the following dates:

a. July 22, 1790: The date of the enactment of the first version of the federal Nonintercourse Act?

No

b. March 31, 1834: The date on which the District of Marshpee was established. [sic]

Yes

c. March 3, 1842: The date on which formal partition of land in the District of Marshpee among the proprietors of Marshpee and their children was authorized by act of the legislature of the Commonwealth of Massachusetts?

Yes

d. June 23, 1869: The date on which all restraints on alienation of land held individually by Indians and people of color known as Indians were removed by act of the legislature of the Commonwealth of Massachusetts?

No

e. May 28, 1870: The date on which the Town of Mashpee was incorporated by act of legislature of the Commonwealth of Massachusetts: [sic]

No

2. Did the plaintiff group, as identified by the plaintiff's witnesses, constitute an Indian tribe as of August 26, 1976: The date of the commencement of this law suit?

No

3. If you find that people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976 listed in Special Question No. 1, did they continously exist as such a tribe or nation from such date or dates up to and including August 26, 1976?

No"

Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940, 943 (D.Mass.1978).

After receiving these answers, but without discharging the jury, the court requested memoranda from the parties to show cause why an order of dismissal should not be entered on the basis of the jury's answers. Plaintiff argued that the special verdicts were inconsistent and ambiguous and moved that, therefore, a new trial should be ordered. The court denied the motion and dismissed the case. Plaintiff asserts in appeal No. 78-1272 as error the court's denial of the pre-trial motion for a continuance, certain aspects of the court's instruction on the definition of "tribe", the court's instructions concerning allocation of the burden of proof, the court's ruling that the special verdicts were not fatally inconsistent or ambiguous, and the court's handling of an ex parte communication with a juror. These issues will be taken up in turn, and we will present the necessary factual background as needed. A fuller discussion of the relevant history may be found in *Mashpee Tribe, supra,* 447 F.Supp. at 943-47. We will not attempt to duplicate the district court's effort.

I.

Plaintiff argues that the district court erred by refusing to grant a continuance pending Department of the Interior action on Mashpee's application for federal recognition as a tribe. Plaintiff moved for a continuance upon learning that the Department, in a departure from previous policy, had issued proposed regulations for determining whether to recognize tribes and that, using these regulations, the Department would begin proceedings concerning the Mashpees. The court denied the motion but invited the Department to participate in the trial either as an intervenor or as an amicus curiae with permission to submit questions for the court to ask witnesses. The Department chose not to participate in either capacity in part because the Department had not yet taken "a definitive position on the regulations" and, thus, would "not be able to participate meaningfully in the trial of this case at this time."

We hold that the court acted correctly in denying the continuance. The cases cited by plaintiff demonstrate that this is not the kind of case in which the Supreme Court has required courts to defer to administrative process. The deference doctrine [1] primarily serves as a means of coordinating administrative and judicial machinery. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 68, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970); *United States v. Western Pacific R. R. Co.,* 352 U.S. 59, 62, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); *Far East Conference v. United States,* 342 U.S. 570, 575, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc.,* 430 F.2d 334, 339 (1st Cir. 1970). It is meant to promote uniformity and take advantage of agencies' special expertise. *Western Pacific R. R. Co., supra,* 352 U.S. at 64, 77 S.Ct. 161; *Far East Conference, supra,* 342 U.S. at 574-75, 72 S.Ct. 492. In a recent pair of antitrust cases against a commodities exchange regulated by the Commodities Exchange Commission, the Court looked at three factors to determine whether a court should defer: (1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court. *Chicago Mercantile Exchange v. Deaktor,* 414 U.S. 113, 114-15, 94 S.Ct. 466, 38 L.Ed.2d 344 (1973); *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973). Other cases have identified

[1] The doctrine has occasionally been referred to under the label "primary jurisdiction", *see, e.g., Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 68, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970), but the Court has not used the label in all its administrative deference cases. The problem, strictly speaking, is not one of jurisdiction. Indeed it comes into play only when both the court and the agency have jurisdiction over at least portions of the dispute. Rather the problem is one of harmony, efficiency, and prudence.

other reasons for deferring to administrative agencies. Deference can dam a potential flood of suits seeking de novo review of agency determinations. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653, 93 S.Ct. 2488, 37 L.Ed.2d 235 (1973) (fearing suits testing the status of each newly developed "me-too" drug). Deference can permit an agency to follow through and supervise earlier actions. *Port of Boston, supra,* 400 U.S. at 68, 91 S.Ct. 203 (agency had approved the agreement under dispute). The doctrine recognizes that some problems are better solved by the more flexible procedures possible before agencies not bound by Article III limitations. *Id.* And, finally, agencies often have prescribed procedures specially designed to resolve particular kinds of disputes. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 339, 83 S.Ct. 379, 9 L.Ed.2d 350 (1963); *Western Pacific R. R. Co., supra,* 352 U.S. at 64, 77 S.Ct. 161.[2]

The Department of the Interior has not historically spent much effort deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the Department has dealt. The Department has never formally passed on the tribal status of the Mashpees or, so far as the record shows, any other group whose status was disputed. Therefore, the Department does not yet have prescribed procedures and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians. Moreover, the facts in this case, though developed and interpreted in part with the expert help of historians and anthro-

[2] Though the Court has suggested that " '[i]t is a doctrine allocating the law-making power over certain aspects' of commercial relations", *United States v. Western Pacific R. R. Co.*, 352 U.S. 59, 65, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956), it has been applied somewhat more broadly. *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed.2d 350 (1963) (management of public lands). Nor is a plaintiff barred from invoking the doctrine. *Id.*

pologists, are not so technical as to be beyond the understanding of judges or juries. As the court said in its charge, "We are dealing with the human condition here as well." Finally, ours is a straightforward Article III case. The resolution will not affect rights of others than the parties except in the traditional legal effect that our opinion will have as precedent. The facts on which the dispute turns, though hard to come by, are adjudicative facts. They are not in the nature of legislative policy decisions. For all these reasons we cannot be sure how helpful the Department's ultimate decision might be. We can, however, be certain that the decision will not be available soon. The court was right to respect the "strong public interest in the prompt resolution" of the case and not defer to administrative action of uncertain aid and uncertain speed. It follows from what we have said, of course, that in another case, once the Department has finally approved its regulations and developed special expertise through applying them, we might arrive at a different answer.

II.

The next challenge is to the court's instructions on the definition of "tribe". Plaintiff must prove that it meets the definition of "tribe of Indians" as that phrase is used in the Nonintercourse Act both in order to establish any right to recovery and to establish standing to bring this suit. This issue is particularly difficult in this case because the Mashpees differ from most other groups who have sought to assert rights as Indian tribes. The federal government has never officially recognized the Mashpees as a tribe or actively supported or watched over them. Moreover, the Mashpees have a long history of inter-marriage with non-Indians and acceptance of non-Indian religion and culture. These facts do not necessarily mean that the Mashpees are

not a tribe protected by federal law,[3] but they do make the issue of tribal existence a difficult factual question for the jury.

Because most groups of Indians involved in litigation in the federal courts have been federally recognized Indians on western reservations, the courts have been able to accept tribal status as a given on the basis of the doctrine going back at least to *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 756-57, 18 L.Ed. 667 (1867), that the courts will accord substantial weight to federal recognition of a tribe. *See, e.g., Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton,* 528 F.2d 370, 377 (1st Cir. 1975). One consequence is that very little case law has developed on the meaning of "tribe". The court below, in its instructions to the jury, relied primarily on *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901):

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one

[3] As we said in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 377 (1st Cir. 1975), "Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized." On the other hand, though the scope of congressional power to deal with the Indians is very broad, it is not unlimited. Congress cannot deal with Indians solely as a racial group. *United States v. Antelope,* 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977). Nor can Congress arbitrarily label a group of people a tribe. *United States v. Candelaria,* 271 U.S. 432, 439, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *United States v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913). A tribe must be something more than a private, voluntary organization. *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

> leadership or government, and inhabiting a particular though sometimes ill-defined territory . . ."[4]

Neither party challenges this basic definition, but it is far from satisfactory. Its four elements—(a) "same or similar race"; (b) "united in a community"; (c) "under one leadership or government"; and (d) "inhabiting a particular . . . territory"—leave much to be explained. A few other cases have described characteristics of tribes whose status as such was in question. *See United States v. Candelaria,* 271 U.S. 432, 442-43, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 756, 18 L.Ed. 667 (1867); *United States v. Wright,* 53 F.2d 300 (4th Cir. 1931). But these tribes bore little resemblance to the Mashpees.

Starting with the *Montoya* definition, the district court went on to explain each of its elements at some length. Plainiff asserts as error the court's explanation of two of the elements of the definition: (1) the requirement of a "leadership or government" and (2) the requirement that the Indians be "united in a community".

[4] Though *Montoya* did not involve the Nonintercourse Act, this definition was later used in *United States v. Candelaria,* 271 U.S. 432, 443, 46 S.Ct. 561, 70 L.Ed. 1023 (1926), which did involve the Nonintercourse Act. The scope of the phrase "Indian tribe" may vary from statute to statute, *see United States v. Sandoval,* 231 U.S. 28, 48-49, 34 S.Ct. 1, 58 L.Ed. 107 (1913), but it is important to bear in mind that generally legislation conferring benefits or protection on Indians is to be construed liberally in their favor. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F.Supp. 649, 660 (D.Me. 1975), *aff'd,* 528 F.2d 370 (1st Cir. 1975), and cases cited. The policies of the Act in question may be used to aid in interpreting the Act, *Joint Tribal Council, supra,* 528 F.2d at 377, but if Congress chooses to give Indian tribes a far-reaching remedy that choice should not be frustrated by judicial decree.

Beginning with the requirement of leadership, we will reprint the several pertinent sections of the charge rather than attempt to summarize the court's explanation.

> "There has to be a leadership or government. . . . Obviously, this was a little enclave in one corner of Massachusetts. It could not have a government like that in Massachusetts; it could not compete with the government of Massachusetts. Clearly, there was an area in which it could exercise control over its own internal relations, to control the relationship . . . among its own members . . . , between the management and the others and among all of the members of the group."
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> "The level of leadership or government that was appropriate for this situation also has to be considered in terms of the need. How much government do you need? You've got three or four hundred people on 13,000 acres of land, and their interaction may not have been so intense as to require constant regulation. Bear in mind these . . . three and four hundred people . . . were grouped in families, in family households, and it may well be they were spread kind of thin. How much government is required? Well, that is for you to decide."
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> "There were a series of petitions in the 1740's-1760's, leading to the formation of the district. After 1788 some more petitions complaining about the grieved position under the guardians. It may be a reasonable inference from those events that there was a continuing political leadership, but you must be prepared to make that inference, and that is solely for you to determine because sporadic grouping, sporadic leadership is not what is meant by 'united in a community under one leadership or government.'

> You can have that any time in a fire or flood in the neighborhood where some people will emerge and organize a rescue or organize boats or a bucket brigade, whatever is needed. That is not the kind of leadership we are talking about. We are talking about something that goes on, has continuity. Continuity of leadership in which leadership is passed on in some orderly way."
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> "[T]he notion of sovereignty . . . is not an element, a necessary element of tribal existence. What it is is a leadership which has evolved in some respect . . . which has its roots and has evolved from a once sovereign Indian community. Now, it may take different forms."
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> "Clearly, whatever kind of leadership or government the tribe has, if it is a tribe, it cannot compete with the duly established government of the Commonwealth. You would not expect, under these circumstances, and it would not be legally permissible for a group within a town to have its own courts, in any formal sense. It could conceivably set up a school system if it were sufficiently wealthy, . . . but that . . . should be considered in the context of a school system, which until recently, was predominantly Indian, anyway, according to the testimony."
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> "The testimony most favorable to the plaintiff has been that these leaders, as identified by various witnesses, are leaders with respect to a way of life. . . . [Y]ou can consider all of that testimony, whether there is enough in your opinion to warrant the inference that there was controlling leadership of significant elements in the lives of the people. Significant elements. For the leadership to be such as qualifies the group as a tribe, there must be followers."
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"There was a core group that was very much concerned about Indian affairs, a good many of them have shown up in the courtroom, some have not.

Now, the existence of 30, 40, 50, 60 people, who are concerned with the existence of a chief, who pay attention to what the chief is doing, expect various things from the chief of the tribe or the leaders of the tribe, or the leaders of the group, rather, is not enough. You've got to find that the leadership, whatever it is, has a significant effect upon at least a majority of the claimed group."

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"There will be a diminution of influence from the center of the organization to the fringe . . . [T]here are some people who are reasonably enthusiastic and attend all the time, and out at the fringe there are some people that don't show up but once a year and not every year at that. That is common characteristic of all organizations. We are dealing with the human condition here, as well. I suppose, if you found that to be the situation, it would not mean that there was no tribe. But you do have to find that it is something more than just a small coterie, a small band of enthusiasts who are supporting the Indian leadership, if that is what it is, in Mashpee.

. . . Obviously, more enthusiasm should be e[xp]ected of those within the town than those that are without. . . . Well, . . . it's up to you to decide whether you've got a leadership that is governing the conduct, the lives of the people in some significant way, that people order their lives in response to these leaders' requirements in some significant way. . . ."

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"This is nothing more essentially political than speaking on a town meeting floor or lobbying the Governor

of the state, no matter for what purpose. . . . [B]ut the question is, is it significant? Is it evidence of a continuing leadership? That goes back to what I said about the petitions that were filed in the eighteenth century."

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"Now, that is for you to decide, under all the circumstances, whether that leadership is tribal leadership, whether it's the leadership which would be followed, adopted and obeyed in some significant degree by at least a majority of the people who are going to be a tribe in 1976."

Plaintiff complains that the court erroneously required it to prove "binding authority" over the group's members and an orderly means of transmitting the leadership. The first complaint is not true as a matter of fact. The court never said that a tribe's leaders' influence must be "binding" but that they must cause the people to "order their lives . . . in some significant way". The people must "follow[], adopt[] and obey[]" the leadership. And the leadership must be "controlling . . . of significant elements in the lives of the people." But the court's discussion demonstrates that it did not require plaintiffs to show "coercive power or binding authority" or to "exhibit the full panoply of governmental powers exercised by advanced groups . . . ." The court was trying to establish a fair test to determine whether the alleged tribal leadership had any followers. If no one follows, then the would-be leader is not leading anyone and cannot sustain the claim to leadership.

The court explicitly charged that plaintiff did not have to show any kind of sovereignty or an ability to compete with the Commonwealth of Massachusetts for power over the Mashpees. The court pointed out that plaintiff need not have a court system, a school system, or any other formal governmental institutions. Further, the court instructed the jury to consider the claims that the asserted leaders "are

leaders with respect to a way of life". Such leadership is certainly not expected to be coercive or binding. Plaintiff was allowed to show leadership, at least in part, by demonstrating that the alleged leaders were role-models to whom a majority of the asserted tribe responded on questions of tribal or ethnic significance. In the same vein the court, in its discussion of diminution of influence towards the fringe of an organization, permitted the jury to consider as followers those who responded to the leaders with less than total enthusiasm. Absolute obedience, voluntary or coerced, was explicitly not a prerequisite to tribal existence. Furthermore, the examples of political activity that the court allowed the jury to consider in deciding whether the requisite leadership or government existed were not examples of coercive power over constituents, but of representation of constituents' interests before non-Indian governmental bodies. One need have no coercive power to speak at town meetings, submit petitions, or lobby a governor. The court required plaintiff to show only such leadership or government as its situation required. The court pointed to some legitimate evidence. Plaintiff's problem was that it did not submit sufficient evidence to convince the jury that the asserted leaders had enough followers on significant issues.

Turning to the issue of continuity of leadership, it is true that the court at one point required that leadership be "passed on in some orderly way". Read in the context of the entire instruction, however, it is clear that the court was not imposing a requirement of formal systems of succession. The court never required elections, inheritance, or any other fixed system of determining a leader's successor. The court's concern was not with how the leadership passed, but with making sure that the leadership did pass. The sentence on which plaintiffs seize was a way of differentiating the necessary leadership from sporadic, crisis-oriented leadership that would disappear as soon as the crisis was resolved. We agree that a fire or a flood cannot spawn a "tribe" that exists only during the disaster.

Accordingly, the court instructed that there must be a continuous leadership. It suggested as evidence worth considering, the series of petitions filed on behalf of the Mashpees beginning in the middle of the eighteenth century. The court permitted the inference that those petitions might be evidence of a continuing political leadership. We interpret the court's instruction to require that there be a recognized leadership to which the people can turn at any time—a leadership "orderly" in the sense that, whether or not there is a specific short-term crisis, the need for ongoing leadership is always met without a significant break in continuity. Nothing the court said contradicted plaintiff's position that a tribe ought to be able to choose its leaders in any way it sees fit and for whatever purposes are necessary. *Montoya* held that a group without leaders or government could not be a tribe. The district court's instructions are consistent with and, probably, more favorable to plaintiff than the every day usage of the terms in the *Montoya* definition would be. Without the court's interpretation the jurors might well have construed the phrase "leadership or government" to imply the formal kinds of structures and institutions by which the jurors themselves are governed.

Not only did the portions of the court's instructions complained of not mean what plaintiff suggests, but the court read to the jury the very language that plaintiff argues is a more correct statement of law. That passage, also from *Montoya,* explained why, according to the Supreme Court, Indian tribes were not nations.

> "As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the

> word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment." 180 U.S. at 265, 21 S.Ct. at 359.

Though not "nations" in the eyes of turn-of-the-century civilizations, the groups so described were tribes. The discussion in *Montoya* of "nation" supplements that Court's definition of "tribe". Different sections of an opinion should be read as consistent with each other. Moreover, the district court's definition of "tribe" is consistent with the passage cited above. Therefore, plaintiff's challenge to this aspect of the instruction must fail.

Plaintiff interprets the court's instruction relative to the "united in a community" requirement to permit the jury to find there is no tribe if the Indians have become assimilated into the general society. Its concern is that the jury could find that the tribe ceased to exist through assimilation without having voluntarily decided to abandon tribal existence. Such a finding, it asserts, would be contrary to established law. Again, we will reprint the relevant portions of the court's instruction before discussing plaintiff's position.

> "There has to be a community. 'United in a community,' the Court said. I suggest to you an Indian community is something different from a community of Indians. That is to say, it has some boundary that separates it from the surrounding society, which is perceived as Indian and not merely as neighborhood or territory."[5]
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[5] The word "boundary" was used during the trial as an anthropological concept. A boundary in this sense is not something tangible or territorial like a fence or a border. Rather, it is an attitude or consciousness of difference from others, a sense of distinction between "we" and "they".

> "It would be permissible to find that the boundary was in part established by the outside, that is, that there was a social boundary established in part by discrimination of the white inhabitants against the Indians."
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> "Now the question for you to decide is whether in accepting this property [the proprietorship], accepting these rights with their limitations, the Indians intended to give up their tribal organization and assume an English organization, or whether it was simply the tribal organization carrying on as owners of this plantation with a different label."
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> "The question comes when English forms are adopted. English labels are adopted, whether that has constituted an abandonment of the tribal form in a complete submission and adoption of an English form instead. Abandonment being the key word. Abandonment of a right or status does not occur unless it is voluntary, unless it is a knowing and willing and voluntary act. Abandonment cannot be found because of conditions which have been imposed from the outside."
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> "Again [looking at 1976], we have the question of community and whether that community is defined by characteristics which are identifiable as Indian, not necessarily aboriginal Indian."
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> "It is, I suppose, possible that by reason of circumstances, tribal existence be so suppresed that it be in limbo for a period, that it not be manifest for a period without there being an abandonment. If you find that there was, by reason of the activities in 1869, 1870, a

conscious abandonment of tribal status, then you would not be warranted in finding the existence of a tribe in 1976."

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"Now, there is one other aspect that I would like to address, and that is the subject of assimilation. In one of the cases it is said that the Nonintercourse Act, really, refers to poor and uninformed people as opposed to assimilated and sophisticated. . . . And by saying a group is assimilated is the reverse of the coin of saying they have a distinct Indian community, and so I suggest that you not be concerned about that except in that context.

If you find that the group is assimilated, well, it doesn't have a distinct community, it's just blended in with everybody else, in all respects or in all significant respects. So assimilation is simply a way of expressing the reverse of the existence of an Indian community."

We agree that if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe and by its guardian, Congress, on its behalf.[6] *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 757, 18 L.Ed. 667 (1867); *The Confederated Salish and Kootenai Tribes v. Moe,* 392 F.Supp. 1297, 1315 (D.Mont.1975) (supplemental

[6] In *Passamaquoddy, supra,* we held that the Nonintercourse Act established a trust relationship between Congress and the Indian tribes, 528 F.2d at 379, and that "Congress alone has the right to determine when its guardianship shall cease. . . . Neither the . . . Tribe nor the State . . . , separately or together, would have the right to make that decision and so terminate the federal government's responsibilities." *Id.* at 380 (citations and footnote omitted). The establishment of a trust relationship with tribes generally, however, did not guarantee the perpetual existence of any particular tribe. Plaintiff here must still prove that it was a tribe at the relevant times before it can claim the benefit of a trust relationship.

order of three-judge court), *aff'd sub nom. Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed. 96 (1976). A tribe, even if it is federally recognized, however, can choose to terminate tribal existence. *See The Kansas Indians, supra,* 72 U.S. at 759 (a state's policy of treating Indians the same as other citizens could "eventually succeed in disbanding the tribe," but presumably only to the extent the tribe chose to acquiesce in that policy); *United States v. Joseph,* 94 U.S. 614, 617, 24 L.Ed. 295 (1876), *overruled as to result but not necessarily logic, United States v. Sandoval,* 231 U.S. 28, 48, 34 S.Ct. 1, 158 L.Ed. 107 (1913). Certainly individual Indians or portions of tribes may choose to give up tribal status. *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (holding that that portion of tribe which chose to stay behind when tribe moved dissolved relations with tribe and lost interest in tribal claims); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 171, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *United States v. Wright,* 53 F.2d 300 (4th Cir. 1931) (holding that portion of tribe that chose to stay behind when tribe moved lost tribal status though gradually restored to that status by federal recognition and protection). If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear.

The court instructed the jury that any abandonment of tribal status must be "knowing and willing and voluntary".[7] Once the jury found that a tribe existed in 1834 and 1842, that tribe could not cease to exist absent a voluntary

[7] This standard for abandonment is sufficiently favorable to the plaintiff. Choosing not to continue as a tribe raises issues very different from those raised when one claimant to property asserts that another abandoned the property. We can think of no reason to import the property law rules concerning abandonment into our context simply because the same word has been used.

decision.[8] The instructions barred the jury from deciding that the tribe went out of existence through some involuntary process of assimilation. The court instructed that involuntary imposition of conditions could not constitute an abandonment. The Indians had to "intend[] to give up their tribal organization" and abandon their tribal rights and status voluntarily. The jury obviously found that the tribe had made such a decision. It was open to the jury to decide whether the tribe had decided to give up being a distinct community and instead to merge with the rest of society in all significant respects. We cannot know whether the jury based its verdict on a finding of voluntary assimilation, but such a decision would not go contrary to law.

We conclude that though a few isolated sentences of the charge may have been unclear or overstated, the instructions taken as a whole were largely consistent with the position plaintiff argued before us. Therefore, we will not reverse on the basis of the court's instructions. This holding is a narrow one, and it may be useful to point out what we do not hold. We have no occasion to pass on portions of the court's instruction other than those discussed above. Even as to those portions we have considered, the issue we have decided, technically, is not whether those portions are correct as a matter of law, but whether they conform to the objecting party's view of the law. Finding they do, we see no remaining controversy. Because there are no sure yardsticks against which to measure the court's instructions, we

[8] We reject defendants' argument that the court did not indicate that tribal existence could terminate through social or cultural assimilation. The court instructed that if the group were sufficiently assimilated then it could not be a tribe. Since the plaintiff was required to prove its tribal status at each relevant date, if the jury found the group was a tribe at one date, but later had voluntarily become assimilated—had ceased to exist as a separate and distinct community—then the jury would have to find they were no longer a tribe.

cannot say that even those we considered are correct or the best possible, but we have not found any law conflicting with the portions of the charge we have reviewed.

The court did a good job with a very difficult task. Its explanation related the elements of the broad legal definition, developed when Indian tribes' relationship to the United States was very different, to the particular history of this group and to the modern position of Indians in our society. We think it appropriate that the definition of "tribe" remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions. That the Mashpees have lost this case represents not a failure of the law to protect Indians in changing times, but a failure of the evidence to show that this group was an object of the protective laws. In future cases, if the issue of tribal status is raised, the court, with the aid of the parties and expert witnesses, will be able to shape instructions responsive to the special problems presented at that time. For these reasons, we think it preferable not to adopt, word-for-word, the court's instructions as the "true" definition of "tribe". Unlike, for instance, explanations of "reasonable doubt", no one explanation of the *Montoya* definition can adequately serve in all cases at all times.

III.

Plaintiff next objects to the trial court's allocation of the burden of proof. The court instructed the jury that the plaintiff carried the burden of proof on every issue and that the defendant had no burden. "What this means is that if you are left in doubt as to a particular issue that is material, you must find for the defendant. . . ." Appellant contends that once it showed it was a tribe, the burden

should have shifted to appellee to prove that plaintiff voluntarily gave up tribal status.[9]

Appellant's first argument, and the only one clearly presented to the trial court,[10] is that 25 U.S.C. § 194 requires the burden to shift. That section provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a

[9] The court did ease the plaintiff's task somewhat by instructing the jury that it could "infer that . . . conditions . . . tend to continue and change if they do change, gradually." Though the specific purpose of this instruction was to permit the jury to use evidence relating to general periods of time in deciding whether plaintiff was a tribe on the specific dates mentioned in the special verdicts, it permitted the jury to consider whether the defendants had presented evidence to show that conditions, once established, changed. The jury might have chosen, in effect, to shift the burden to defendants.

[10] Though defendants did not argue the point, it is questionable whether plaintiff preserved the burden of proof issue for appeal except as a matter of statutory law. Both the request for instructions and the objection to the instructions specifically referred to 25 U.S.C. § 194 as the grounds for plaintiff's version of the law. The Federal Rules of Civil Procedure, Rule 51, specifically require a party not only to object to an instruction, but to state the grounds for objection. A party cannot reserve grounds for objection in order to deprive the trial court of the opportunity to correct the instruction, thereby creating an appealable issue. "As a general rule, where a party fails to object to an instruction, we will not consider that objection upon appeal. *Stafford v. Perini Corp.*, 475 F.2d 507, 511 (1st Cir. 1973)." *Johnston v. Holiday Inns, Inc.*, 565 F.2d 790, 797 (1st Cir. 1977). The same rule can apply to limit parties to those grounds for objection preserved below. *See Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 624 (7th Cir. 1976); *Falkerson v. The New York, New Haven & Hartford RR.*, 188 F.2d 892, 896 (2d Cir. 1951). We discuss other arguments below because defendants do not raise the issue and because we consider the substantive issue important enough to err, if we err, in favor of deciding the merits.

> presumption of title in himself from the fact of previous possession or ownership."

Whatever the applicability of § 194 might have been in a later stage of this case,[11] it was not of any relevance at this stage. There can be no presumption of title in plaintiff until plaintiff has proved it is an Indian tribe and was a tribe at each relevant date. As to these threshold questions, § 194 cannot aid the plaintiff.

In the alternative, plaintiff relies on general evidentiary principles for the same proposition.[12] Plaintiff, having established tribal status in 1834 and 1842, could not cease to be a tribe involuntarily. Therefore, plaintiff suggests, the defendants should have been required to prove that the termination of the tribe was voluntary. This argument is appealing. One of the few principles available to guide us is that normally the party asserting the affirmative of a proposition should bear the burden of proving that proposition. 9 Wigmore on Evidence § 2486, at 274 (3d ed. 1940). *See Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 178 F.2d 541, 547 (9th Cir. 1949); *Reliance Life Ins. Co. v. Burgess*, 112 F.2d 235, 237-38 (8th Cir.), *cert. denied*, 311 U.S. 699, 61 S.Ct. 137, 85 L.Ed. 453 (1949). Here defendants, by way of rebutting plaintiff's claim to be tribe, argued that, assuming plaintiff was a tribe at some point, the tribe voluntarily gave up its separate status. If the jury did not find that the termination was voluntary, then it would have found the tribe still existed pursuant to the court's instruction that an abandonment must be knowing and willing and voluntary.

[11] We need not decide whether an Indian tribe, as opposed to an individual Indian, may take advantage of the statute. Nor need we determine how to construe "white person".

[12] We have already rejected application of the specific law of abandonment, *supra*, note 7, and as plaintiff recognizes, merely labelling abandonment an affirmative defense does not advance the argument.

As Professor Wigmore noted, however, the affirmative allegation rule is not invariable.[13] In this case, plaintiff could not avail itself of the Nonintercourse Act until it established that it either had always been or became and continued to be a tribe of Indians. Defendants denied plaintiff had ever been or continued to be a tribe. Defendants' case relied in part on evidence that the residents of Mashpee were not essentially different from other residents of Massachusetts, that they were assimilated into the general society and had abandoned tribal life. Consistent with the court's charge, plaintiff had an opportunity to rebut such evidence by introducing evidence showing that any abandonment was the involuntary product of outside coercion. The jury evidently found a change in status that was not involuntary, and, therefore, plaintiff stopped being a tribe.

So characterized, the voluntariness issue is part of the plaintiff's case. We think it fair that plaintiff bore the risk of nonpersuasion. If the jury found that plaintiff became assimilated between 1842 and 1869, and if there were insufficient evidence either way or equally balanced evidence both ways as to whether or not the abandonment was voluntary, plaintiff would have failed to prove it was a tribe at a relevant time.[14] Moreover, plaintiff had an advantage because evidence of coercion from outside the community a century ago is more likely to be available today than is evidence of the state of mind of the individuals who changed

[13] 9 Wigmore on Evidence § 2486, p. 274 (3d ed. 1940). Even Professor Wigmore was forced to confess, "The truth is that there is not and cannot be any one general solvent for [allocating the burden of proof in] all cases. It is merely a question of policy and fairness based on experience in the different situations." *Id.*, at 275.

[14] The importance of the burden of proof is minimized in this case because each party presented some evidence relevant to the voluntariness of the tribe's change in status. Therefore, it is unlikely that the issue was decided for lack of evidence. The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendants' interpretations of the historical data.

their lifestyles. That is, historical records would reveal forced migrations, governmental dealings, urban encroachments, the presence of outsiders, or other arguably coercive forces more readily than the important concerns or thought processes of the Indians. Consequently, in order to prove that abandonment was voluntary, defendants would probably have to try to prove a negative, the absence of coercion.[15] Therefore, we conclude that the court did not err in leaving the burden on the plaintiff.

IV.

Plaintiff argues that the special verdicts returned by the jury are irreconcilably inconsistent and fatally ambiguous. As a consequence, plaintiff suggests that it was error to enter judgment and that the only solution was to order a new trial. Where a trial court has entered judgment on the basis of a jury's special verdicts, "an appellate court must affirm if there is a view of the case that makes the jury's answers to the interrogatories consistent." *Atlantic Tubing & Rubber Co. v. International Engraving Co.*, 528 F.2d 1272, 1276 (1st Cir. 1976). This duty is drawn, at least in part, from the Seventh Amendment.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v.*

[15] This burden is placed on the government when it seeks to introduce a defendant's confession in a criminal case. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *United States v. Christian*, 571 F.2d 64, 69 (1st Cir. 1978). But the defendant's right at issue is constitutionally protected, and the evidence available to the government is much fresher and more within the control of the burdened party.

Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962).

We rule that the jury's answers can support the judgment.

The alleged inconsistency is that there is no evidence that could support the jury's conclusion that the tribe that existed in 1842 voluntarily abandoned tribal status at some time prior to 1869 when the jury found it was no longer a tribe. On the evidence of the case, viewed most favorably for defendants, the district court found that the jury could (though it was by no means compelled to) conclude that the tribe had assimilated into general non-Indian society, and that that assimilation was voluntary. *Mashpee Tribe v. Town of Mashpee, supra,* 447 F.Supp. at 948-49.

In agreeing with the district court on this issue, we stress that our review constrains us to look at that evidence and the inferences reasonably drawn therefrom which support the special verdicts. We add that there is not an abundance of evidence relating either to the external activities or internal attitudes of the Indians at Mashpee during this quarter of a century. Nevertheless, even apart from the burden of proof, which we have held to be correctly imposed on appellant, the evidence and inferences were sufficient to support a jury finding that what was a tribe in 1842 had voluntarily assimilated into the general society by 1869.

These are the factors on which we rest that conclusion.

—First, the same intense political activity that could have led the jury to find tribal existence in 1834 and 1842 was novel for the group and limited in time and scope of objective. The goal of becoming a district with certain rights of self-government was achieved in 1834. That of being permitted to divide common land among Indian members of the community was achieved in 1842. The jury could infer that the tribal organization, having accomplished its purposes, became less important to the community.

—While the political structure of Mashpee, governed by "proprietors", remained essentially the same from 1834 to 1870, the jury could have found the seeds of change to have been sown when division of the common land was authorized in 1842. There was evidence of substantial in- and out-migration throughout these years, the newcomers including Indians, white, and other non-white people, becoming both proprietors and tenants. Testimony of Mashpee inhabitants, both Indian and other non-whites, at a legislative hearing in 1869 revealed sad experiences in land use such as the gradual loss of the forests, inability to use the land as security for loans, and pauperization of non-Indian husbands of proprietors, observations suggestive not so much of tribal cohesiveness and communality as of individual aspirations and frustrations. Indeed, one of the speakers told of many young people who had left Mashpee rather than live on common lands and returned only after the law of 1842.

—The report of an 1869 legislative hearing on a petition to remove restrictions on the alienation of land and to grant citizenship could also have supported the special verdict. Two of the three Mashpee selectmen, with others, had filed the petition. Others opposed. At the hearing six spoke against, and one seemingly straddled. Of the four opponents, two took the position that action was premature and wanted from ten to thirty-four more years before full citizenship and freedom to alienate were given. In a straw vote 14 voted for removal of restrictions and 26 voted against removal, while the vote for immediate citizenship was 18 to 18. While this report shows a split opinion, the jury was entitled to give weight to the endorsement of removal of restrictions on alienation by a majority of the selectmen (and the reflection of the larger community of 300-400 Mashpee inhabitants), to the opinions of the two apparently most venerated leaders, who both wanted to secure equal rights without special restrictions and disagreed only as to the timing of the change, and to the vote of approval

at the first meeting of the newly authorized town the following year. The desire of Mashpee residents to be able to alienate land, though not in itself inconsistent with tribal existence, could support the inference that the residents had begun to focus more on personal than communal advancement; more on the ability of individuals to compete as members of society than of the tribe to resist society's impositions.

—Under the court's instructions the jury was allowed to consider evidence of Mashpee life shortly after the terminal year, 1869. Such evidence as there was indicated that many of the young men were serving on vessels, and that farming, some manufacturing, a shipping enterprise, a hotel and a burgeoning hunting and fishing business constituted the economy. Also, the town took over the remaining common land. From this too, particularly in the absence of any evidence tending to show a discretely "Indian" community, the jury could have inferred that Mashpee was voluntarily trying to carve a destiny like many another rural and coastal town; to change from an "Indian community" to a community that happened to be made up largely of Indians.

Neither party took the position at trial that the Mashpees' tribal status or lack of status changed in any significant way in the period between 1842 and 1869. Indeed defendants' counsel often spoke of the period from 1834 to 1870, during which Mashpee was a district, as a distinct era to be dealt with as one unit. Consequently, neither party focused attention on the voluntariness of whatever changes did take place in Mashpee between 1842 and 1869. Nevertheless, the special interrogatories asked the jury to make a separate decision about each of the dates. Plaintiff cannot now take advantage of having failed to discuss a distinction that was apparent to the jury, and at least suggested in the court's instructions (see quotation in next paragraph).

The verdicts' alleged ambiguity derives from the following passage in the charge:

> "It is, I suppose, possible that by reason of circumstances, tribal existence be so suppressed that it be in limbo for a period, that it not be manifest for a period without there being abandonment. If you find that there was, by reason of the activities in 1869, 1870, a conscious abandonment of tribal status, then you would not be warranted in finding the existence of a tribe in 1976. However, if you find there was no such abandonment, then you should consider the [continuity] question."

Plaintiff suggests that if the jury thought tribal existence were temporarily suppressed in 1869 it would not know whether to answer the interrogatory yes (there was a tribe but it was suppressed) or no (temporarily there was no functioning tribe). The trial court agreed that this ambiguity was present at least as to the 1790 question, *Mashpee Tribe, supra,* 447 F.Supp. at 949,[18] but it did not address the possible ambiguity of any other answer.

First, we note that plaintiff did not point out the possible ambiguity during its objections to the instructions at the close of the charge. That was the appropriate time, and plaintiff then had all necessary information. General objections relating to the abandonment issue were not sufficient to give the court an opportunity to correct the charge, had it so desired, before the jury began deliberations. Unlike the alleged inconsistency in verdict, any ambiguity was discoverable on the face of the charge, and was not created by the verdict. The fact that this argument was not specifically made until the verdict had come in

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[18] Massachusetts imposed a guardianship on the Mashpees in 1788. The court decided this ambiguity was immaterial, however, because 1790 was an irrelevant date. That conclusion is not challenged before us.

suggests that plaintiff did not consider this a problem until it discovered its case badly needed some new source of life.

Moreover, we are not persuaded that the interrogatory relative to 1869 was so ambiguous as to bar entry of judgment. The court clearly instructed that a tribe could cease to exist only voluntarily and that outside suppression would not constitute abandonment. "Abandonment cannot be found because of conditions which have been imposed from the outside." We must assume that the jury listened to and understood the court's entire charge. Therefore, if it thought that tribal existence were suppressed, the jury would have had to find that the tribe had not ceased to exist and would have answered "yes" to the interrogatory. The fact that the jury answered "no" as we have already discussed, is a legitimate verdict based on the jury's view of the facts. A new trial was not required on the basis of the special verdicts.

V.

Finally, plaintiff maintains that the trial court failed to investigate sufficiently the impact on the jury verdict of an anonymous phone call made to one of the jurors, and that a new trial therefore is mandatory. Although the trial court's inquiry was terminated too soon to have been fully satisfactory, we find that it acted within the bounds of its discretion in conducting the investigation as it did and that its conclusion that the communication was not prejudicial is supported by a record which "provides an adequate basis for review". *United States v. Doe,* 513 F.2d 709, 712 & n. 3 (1st Cir. 1975).

Approximately three months after the close of the trial, the court received a communication from one John Doe, a resident of Falmouth, Massachusetts, claiming that while riding a commuter bus during the time of the trial he had

been approached by a man who identified himself as a juror in the Mashpee case and that the juror commented that he had received an anonymous phone call about the case. The court promptly asked Mr. Doe to attend a hearing concerning his communication to the court and notified the parties. With counsel for both sides present, Mr. Doe testified as to the contents of his bus conversation with the juror, including his advice that the juror inform the court about the phone call. He also suggested, although somewhat unclearly, that the juror had engaged in a pattern of mentioning his involvement in the Mashpee case to other commuters.

The court then determined that a further inquiry was necessary and the next day a hearing was held with the juror in question, again with counsel in attendance. The juror testified that he had received the call, and had mentioned it to a fellow commuter but had not sought to inform the court about the incident. In response to the court's questioning, the juror stated that he had received the call about two or three weeks before jury deliberations in which the speaker said, "You know which way you better go" and then hung up. He did not recognize the voice, and testified that "the funny part about it" was that the caller did not indicate which "way" he should go. He also mentioned that he had received a series of calls in which he only heard a click as he picked up the receiver, both before and during his service as a juror, and that he had not been certain about the motivation for the calls. Finally, he maintained that he had never discussed the merits of the case outside of the jury room.

The court was unwilling to extend its investigation into several areas that plaintiff's counsel wished to explore. Although allowed, over defendants' over-zealous objections, to ask whether other jurors had told this juror that they had received calls, to which he responded in the negative, plaintiff's counsel was not permitted, again upon defend-

ants' counsel's objection, to question whether this juror had told other jurors about his anonymous phone call.[17]

While it clearly would have been better practice to have allowed this line of questioning, the court did satisfy itself that "while what happened was unfortunate and improper, it did not impeach the jury's verdict in any way at all", describing the phone call as "neutral" and not "prima facie prejudicial'. The call was ambiguous, giving the juror no clues as to which way he should vote and not attach any consequences to choosing the wrong way. *Compare Krause v. Rhodes,* 570 F.2d 563, 566 (6th Cir. 1977). It occurred several weeks before jury deliberations began and was not reported. The juror apparently drew no conclusions concerning its intended message, and our reading of the record indicates that not only was the juror not at all shaken by the experience but that he seemed to attach little significance to it.[18] *Compare Remmer v. United States,* 350

[17] Defendants, in their briefs, suggest that the court did in fact ask the juror whether he had told other jurors about the phone call, pointing to this question: "[What is] your best recollection, whether you talked to one person or more than one person on this subject?" As the record clearly shows, this question was a rephrasing of opposing counsel's inquiry concerning communication to other passengers on the bus, and not other members of the jury panel. This misconstruction of the record, it seems to this court, cannot be explained on any excusable basis.

[18] We are somewhat puzzled by the court's statement to counsel that:

> "The only thing that would seem to me to be left and asked of the juror is whether his decision on the case was affected by the call which seems to me not an inappropriate question at this point, but it is my present disposition to bring this inquiry to a close. I'm satisfied that while what happened was unfortunate and improper, it did not impeach the jury's verdict in any way at all."

It would have been preferable for the court to ask the juror this obviously relevant question. But, given counsel's failure to pursue the question suggested by the court, indicating to us that it was

U.S. 377, 381-82, 76 S.Ct. 425, 100 L.Ed. 435 (1956), *and United States v. Spinella,* 506 F.2d 426, 428 (5th Cir. 1975) *with United States v. Brumbaugh,* 471 F.2d 1128, 1130 (6th Cir. 1973). His only concern was that the court understand that he never intended to act improperly, stating that he had "peace of mind" concerning the trust the court had placed in him as a juror. Furthermore, his testimony that none of the other jurors had mentioned having received a call at least suggests that the subject of phone calls had not arisen in discussions among the jurors. But even if we assume that had the obviously proper question been asked the juror would have responded that he had told his fellow jurors of the call, because of the remoteness in time, the isolated nature of the call, the ambivalence of the message conveyed, and the lack of identifiable source and threatened consequences, we are unable to say, or to find authorities which under similar facts have held, that plaintiff "was deprived of a fair trial and an impartial jury". *United States v. Doe, supra,* 513 F.2d at 713. *See Allen v. United States,* 376 F.Supp. 1386, 1390 (E.D. Pa. 1974), *aff'd,* 511 F.2d 1392 (3d Cir. 1975).

Plaintiff contests several other restraints placed upon the investigation by the court, maintaining, first, that the court should have called in the jury members to determine whether they had received similar communications during the trial and, second, that the court should not have ordered counsel to refrain from making an independent investigation into whether the juror in question had had impermissible conversations with other passengers on his commuter bus. We reject both contentions. First, it was well within the court's discretion to refuse to question other members of the jury panel. Plaintiff's assertion that the call received

apparent that the effect of the call on the juror was minimal, and the court's conclusion that the incident was insufficient to upset the jury process, based in part on the juror's demeanor, we do not consider the omission a fatal one.

by this juror was *prima facie* evidence of possible calls made to other jurors and thus necessitated further inquiry is unpersuasive. The juror testified that no other juror had mentioned having received a communication, giving the court reason to believe that the calls had been limited to this one juror. Moreover, as the court explained at the inquiry, this juror was the only member of the panel who was residing in the area that was being contested in this law suit, and thus was a particularly likely target for crank calls. *See Allen v. United States, supra,* 376 F.Supp. at 1388-90.

We also find that the district court acted within its discretion when it strongly discouraged counsel from independently investigating possible further misconduct on the bus [19] and refused to pursue the inquiry itself. It is true that Mr. Doe, the commuter who brought this matter to the attention of the court, testified that this juror had discussed the case with other passengers on the bus, although he could say nothing about the content of those alleged conversations, noting that he "was asleep most of the time". The juror, however, flatly denied having ever mentioned more than the fact that he was on the jury and testified, "[t]his case per se, merits, any testimony, anything said in the courtroom, I never discussed it or not knowingly anything that would be—I've been fairly discreet, I believe, most discreet." The court expressly found Mr. Doe to be an unreliable witness, and stated, "The juror strikes me as a pretty solid [person], and I don't think there is anything to suggest he was doing anything improper." The court was in a position to evaluate the demeanor and credibility of both witnesses, *see United States v. Brumbaugh, supra,* 471

[19] The court did not, as plaintiff suggests, order counsel to refrain from an independent investigation. At one point he so "instructed" him but later stated that "I think that would be a very, very foolish thing for you to do, . . . extremely foolish. If you insist on doing it, you may have a right to do it, but I think it would be very bad judgment."

F.2d at 1130, and to conclude that no further inquiry into events on the bus, by the court or counsel, was warranted.

VI.

Having rejected each of plaintiff's assignments of error, we must affirm the judgment of the district court. Defendants' separate appeal in Nos. 78-1273 and 78-1274, therefore, need not be decided. Defendants appealed from the district court's construction of the "white settlements" exception to the Nonintercourse Act. *Mashpee Tribe, supra,* 447 F.Supp. at 950. We reject defendants' suggestion that we should afford them an advisory opinion on the subject because of its intrinsic importance and possible relevance to other suits now pending or soon to be filed.

Affirmed, except as to that part of the judgment below of which prosecution of the appeal was deferred by order of this court entered August 11, 1978. One third of their costs to defendants.

BOWNES, Circuit Judge (concurring).

I concur with my brothers in all but one respect of the opinion, namely its treatment of the lower court's instructions on the definition of "tribe." The majority suggests that it is not ruling on whether the instructions are correct as a matter of law, but simply ruling that the instructions conform to the plaintiff's view of the law. *Ante* at 587. There is an understandable reluctance not to be placed in a straight-jacket by embracing one definition for all time and for all circumstances. However, I believe that the district court's instructions were correct as a matter of law, that they comported with the applicable standards as set forth in *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 45 L.Ed. 521 (1901), and that we have a duty to find the instructions legally correct or incorrect and not merely whether they harmonized with one party's view of the appropriate legal standards. Both the district court's delinea-

tion of what constitutes "tribe" as well as this court's extensive explication should, in my opinion, serve as a firm foundation for future cases dealing with this sensitive and difficult issue. I would not shy away from reliance on these instructions and our comments thereon in future cases.

447 F. Supp. 940 (1978)

MASHPEE TRIBE, Plaintiff,

v.

TOWN OF MASHPEE, et al., Defendants.

Civ. A. No. 76-3190-S.

United States District Court,
D. Massachusetts.

March 24, 1978.

Memorandum and Order for Judgment

SKINNER, District Judge.

This action was brought by the Mashpee Tribe of Indians to recover possession of tribal lands allegedly alienated from the tribe in violation of the Indian Nonintercourse Act (25 U.S.C. § 177). The defendants' answer put in issue whether the plaintiff group was in fact an Indian tribe for purposes of the Act at the time suit was brought and at other times deemed by the parties to be critical. The threshold issue of tribal existence was severed for separate trial by order of the court.

After forty days of trial, the issue of tribal existence was submitted to the jury in the form of special interrogatories. The issue of tribal title was reserved as a matter of law for the court to resolve after receiving the jury's answers. The dates chosen in the special interrogatories were those deemed significant by the parties with respect to their several legal theories. I am of the opinion that several of these dates are not significant, as shall hereinafter appear, but they were included to preserve the

widest possible scope of review of the legal issues. The interrogatories and answers were as follows:

1. Did the proprietors of Mashpee, together with their spouses and children, constitute an Indian tribe on any of the following dates:

a. July 22, 1790: The date of the enactment of the first version of the federal Nonintercourse Act?

No

b. March 31, 1834: The date on which the District of Marshpee was established. [sic]

Yes

c. March 3, 1842: The date on which formal partition of land in the District of Marshpee among the proprietors of Marshpee and their children was authorized by act of the legislature of the Commonwealth of Massachusetts?

Yes

d. June 23, 1869: The date on which all restraints on alienation of land held individually by Indians and people of color known as Indians were removed by act of the legislature of the Commonwealth of Massachusetts?

No

e. May 28, 1870: The date on which the Town of Mashpee was incorporated by act of legislature of the Commonwealth of Massachusetts: [sic]

No

2. Did the plaintiff group, as identified by the plaintiff's witnesses, constitute an Indian tribe as of August 26, 1976: The date of the commencement of this law suit?

No

3. If you find that people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976 listed in Special Question No. 1, did they continuously exist as such a tribe or nation from such date or dates up to and including August 26, 1976?

No

The case is now before me on the defendants' motion for judgment of dismissal on the merits based on the jury's answer. Plaintiff has filed an opposition thereto claiming that the jury's answers are fatally inconsistent and on their face violate the court's instructions. It appeared at argument that the plaintiff's preferred remedy is a new trial, and that indeed appears to be the only alternative to the entry of judgment for the defendants. All parties agree that the plaintiff must establish its status as an Indian tribe as of the date that the action was commenced in order to maintain this action in the form elected by the plaintiff.

I. Historical Background

The basic history of Mashpee is not disputed, and a review thereof is necessary to the resolution of the pending motions. For simplicity's sake, I shall refer to the people claiming to be a tribe and their Indian ancestors as Indians [1] and everybody else as non-Indians, except where it is necessary to differentiate non-Indians of African and European ancestry who will be referred to respectively as blacks and whites. References to statutes and deeds in the following exposition include my legal interpretation and construction, to which the parties do not in every case agree.

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[1] I recognize that the plaintiff's claim of being Indian is contested by the defendants, and that the evidence indicates considerable racial mixture among this group.

In 1665, Richard Bourne, a Christian missionary to the Indians, desired to gather a community of Christian Indians in the area surrounding the Indian village of Mashpee and comprising the present Town of Mashpee and parts of present Sandwich and Falmouth. Accordingly, a deed was executed from two Indian leaders named Weepquish and Tookenchosen to five other named persons for the benefit of the "South Sea Indians." The status of the grantors and their capacity to grant title is unknown. One of the expert witnesses gave an opinion that the grantees were a group of village headmen who constituted the ruling council of a tribe known as the Cotichesetts, inhabiting the area of Mashpee and eastward to present Hyannis. The area granted contained a group of small villages of ten or twenty families, the remnants of a once numerous and thriving agricultural community largely wiped out in 1617 by an unidentified epidemic.

In 1666, Quichatisset, the Sachem of Manomet, relinquished his authority over the area and its inhabitants by a deed to substantially the same grantees. There is no evidence as to the form of governance of the area or its inhabitants from this period until 1723.

In 1685, apparently at the instance of Shearjashub Bourne, the son of Richard, the General Court of the Plymouth Colony granted the area to the South Sea Indians *and their children*, subject to a restraint on alienation, namely, that no land should be sold to an Englishman without the consent of all the Indians and the permission of the General Court.[3] It is on this grant that the plaintiff

[3] Plaintiff's Exhibit 38: "The Court, on considerations of the p'mises, doth soe far confirme said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoeuer, by the Courts allowance, without the consent of all the said Indians." The case has been tried, and I think properly so, on the assumption that "English" should be broadly construed to include all non-Indians.

must base its claim of title. *Johnson v. McIntosh*, 8 Wheat. 543, 5 L.Ed. 681 (1823). In 1692, the Plymouth Colony was merged with the Province of Massachusetts Bay, and the powers of its General Court were preempted by the General Court at Boston.

By 1723, Mashpee had been organized as a proprietary. As a result of the 1685 deed, Mashpee differed from other proprietaries in an essential respect. Mashpee was designed to be a permanent Indian plantation, in which the land was to be held in common, entailed, and with a restraint on alienation into the indefinite future. Other proprietaries were designed for founding and developing new communities. They were self-liquidating; the common land of the proprietary was sold off to settlers who organized towns.

In 1746, the General Court appointed guardians to control the finances of the plantation.

These guardians apparently used their position to exploit their wards, and the efforts of the Indians to obtain redress through the General Court were unavailing. By a remarkable feat of daring and resolve, one of the Indians (a Mohegan Indian from Connecticut, who had settled in Mashpee) carried a petition to the King of England. As a result, in 1763, the Mashpee Proprietors were given a large measure of self-government, including the right to appoint constables to protect their woodlots from depredation by neighboring non-Indian settlers.

During the Revolutionary War, the Indian men of Mashpee fought against the British, and a very large number of them were killed. After the war, there were said to be 70 widows in Mashpee out of a population of a few hundred. As one might suppose, this situation encouraged a considerable influx of unattached non-Indian males, mostly black, but including four escaped Hessians and a Portuguese sailor.

This influx apparently had a disintegrating effect, as a result of which the General Court reimposed guardians, whose approval was required for all significant actions.

By 1833, as under the previous guardians, the Indians felt that the guardians were not protecting them, but exploiting them. The precipitating issue was the cutting of wood from Indian land by outsiders. There was some violence. The Indians hired a lawyer and filed a petition with the General Court for relief from the guardianship. At the same time, the Indians rejected the ministry of the Reverend Phineas Fish, who had been sent down from Harvard to carry on "the blessed work of converting the poor Indian," and established their own Baptist Church under an Indian preacher, "Blind Joe" Amos.

In response to this well organized effort, the General Court created the District of Mashpee in 1834. Under the district organization, Mashpee (or "Marshpee") was governed substantially in the manner of a Massachusetts town, with the exception that certain transactions affecting the common lands and the treasury were subject to the approval of a Commissioner appointed by the Governor. The Commissioner also served as Treasurer. By successive legislation, the Commissioner's power was reduced to that ordinarily exercised by a Town Treasurer and eventually the office was filled by election of the proprietors of the district.

The 1834 Act also confirmed the allotment of land to those proprietors who had occupied and improved it, and required the Commissioner to keep a record of the allotments, as well as a list of proprietors. All of the land in the district, whether held in common or in severalty, was exempt from execution, and the proprietors were exempt from state and county taxes.

From 1834 onward, records of the district show that the proprietors voted various ordinances, including regulation of herring fishing. There are no existing records showing such regulations prior to this time.

In 1842, the General Court passed another Act which substantially altered the land title within the district and defined who were to be deemed proprietors. Each proprietor was to be allotted a sufficient portion of the common land of the district to bring his holdings (including the acreage confirmed to his use by the 1834 Act) up to sixty acres. All the land not so allotted remained common land under the control of the Selectment of the District. The title acquired by each proprietor was described in Section 8 of the Act as follows:

> The lands set off in severalty to the proprietors, and all other lands held or acquired by them, shall have all the incidents of estates in fee, except the right of transfer, conveyance or devise to other than a proprietor, and excepting further, that the said lands shall not be liable to be taken in execution; . . . [various detailed provisions for allotment, and for the preservation of the rights of minors] . . . And no land now belonging to a married female proprietor, or which may be allotted to her, or which she may hereafter acquire or inherit in her own right, shall, without her consent, be conveyed or leased, or the wood sold therefrom; and all contracts therefor by her husband, in which she does not join, shall be void; *provided, also,* that upon the death of any proprietor leaving no heirs, all his interest in the lands of the district shall escheat to the proprietary.

In 1869, the Governor of the Commonwealth proposed legislation relieving all the Indians in Massachusetts of their legal disabilities and admitting them to full citizenship. A legislative committee held a hearing in Mashpee. The questions being considered were citizenship and removal of the restraints on alienation of the land. About 40 people appeared, including several non-Indian husbands of female Indian proprietors. Some of the Indians were in favor of citizenship and removal of the "entailments" on

the land, because under existing restrictions there was no way that an Indian could acquire mortgage money for improvements, or liquidate his land holdings to go into commerce. The non-Indians also favored elimination of restraints on alienation because they wished to be able to vote and hold property in Mashpee in their own right. "Blind Joe" Amos, by then describing himself as among the oldest inhabitants, opposed the changes on the ground that the Indians were not yet ready to deal on an equal footing with outsiders and would imprudently sell off all their land. He was in favor of the removal of the restrictions, but not until the generation then in school should come of age. A vote was taken which was split 18 to 18 on the question of citizenship and 26 to 14 in opposition to the removal of the restrictions on the land. (Plaintiff's Exhibit 180, "Phonographic" Transcript of Hearing.)

Nevertheless, in 1869 the General Court passed an act granting citizenship to the Indians, removing their legal disabilities, and releasing the restraints on alienation of land imposed originally in the 1685 deed and carried forward in the 1842 Act. In 1870, Mashpee was incorporated as a Town. The common land of the District was transferred to the Town, and upon application the Superior Court was authorized to order the sale thereof by Commissioners appointed for the purpose. There were some three thousand acres of common land remaining after the allotments of 1842. Most of this land was sold, presumably to the then inhabitants of Mashpee. *See Coombs, petitioner,* 127 Mass. 278 (1879).

It is these two acts of the General Court that the plaintiff complains of as violations of the Nonintercourse Act.

At this point, the ancestors of the present Indians had complete control of substantially all of the land in Mashpee, and they retained it for the next seventy years. "Blind Joe" Amos' prediction did not come true. The Selectment of the District became the Selectment of the Town, and the

Board was composed of Indians until 1968,[3] and a majority were Indians until 1972.

In the early part of the 20th century, it appears that some small part of the Town was sold to outsiders and developed as summer property. Up through the 1930's and early 1940's, however, the area remained substantially as it had been from the 1870's on. Indian witnesses testified that when they were growing up in Mashpee the land was still open and unfenced by its Indian owners, and the upland and shores were readily accessible to everyone for hunting, shellfishing and recreation.

By the 1930's, however, agriculture in New England was in general decline, and so it was in Mashpee. Some land was taken from Indian owners by the Town for taxes, but at least some tax title property was purchased at tax title auction by other Indians.

In the early 1950's and thereafter, the building of super highways to Cape Cod and the pressure of population moving out from the cities encouraged land developers to buy land on Cape Cod and in Mashpee. Some of the Indians sold their land during this period, and some retained their land. While each land sale doubtless appeared profitable to the individual seller at the time, the Indians now find that the aggregate of these land sales has substantially altered the life of their community, leaving them in the minority. The free access to upland and shore that they so long enjoyed has disappeared.[4]

It is principally these land sales by individual Indians to non-Indians which the plaintiff seeks to have declared null and void as in violation of the Nonintercourse Act.

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[3] With one exception in the early 20th century.

[4] This history parallels that of most small towns in eastern Massachusetts and Rhode Island, and more recently in southern Vermont, New Hampshire and Maine.

There was virtually no evidence introduced concerning life in Mashpee between 1870 and 1920. There was evidence that several students at the Carlisle Indian School had given "Mashpee" as their tribal designation during this period, but also that the grandfather of one of the witnesses had deliberately refrained from teaching his children the Indian language, because he wanted them to use English.

In 1920, there was a revival of interest in Indian customs. From 1928 to the present, there has been a "Powwow" held at Mashpee, more or less annually. This is a three or four day celebration featuring Indian dances and songs. Most of these are borrowed from Plains Indians, however, as are many of the decorative symbols and styles of dress, because the ancient modes of east coast Indians have been lost. From the early 1920's through the early 1940's, there were individuals who were sometimes recognized as chiefs and medicine men of the Indian community in Mashpee. The method by which the individuals were selected and their leadership functions were not revealed by the evidence. In 1956 the Sachem of the Wampanoag Nation appointed Earl Mills Chief of the "Mashpee Tribe," on the petition of some of the Indians in Mashpee. Mr. Mills remains the Chief to this day. Mr. John Peters was similarly appointed as Medicine Man and filled that post up until the time of trial, when he was appointed Supreme Medicine Man of the Wampanoag Nation. At one time there was a Tribal Council which met from time to time, but it appears that this group's functions, if any, were primarily social. In 1974 the Mashpee-Wampanoag Indian Tribal Council, Inc., was incorporated. It has acted as representative for the Indians in Mashpee with respect to securing federal educational grants and Comprehensive Employment and Training Act projects, and has been designated as the official representative of the Mashpee Indians in an executive order of the Governor of the Commonwealth. It lobbied for the passage of the executive order, and also se-

cured the title to fifty-five acres of land in Mashpee granted to it by the Town, to be used for tribal purposes.

The leadership functions of the Chief, the Medicine Man and the incorporated Tribal Council, and the extent to which these individuals and the corporation were recognized as significant leaders by the Indians, were the subject of extensive and conflicting testimony.

II. Significant Times

As stated, the designation of the various times in the interrogatories to the jury was intended to preserve the rights of the parties with respect to their legal arguments. There is no doubt, and no disagreement, about the significance of August 26, 1976, the date that this action was commenced, because the right sought to be enforced is exclusively a tribal right.

The defendants claim that 1790 is a critical date because the original Trade and Intercourse Act and its successors only deal with tribes existing at the time of original enactment. They go further and assert that the Congressional power to "regulate Commerce . . . with the Indian Tribes" granted in Art. I, § 8, cl. 3, restricts congressional action to existing tribes. It is doubtful if authority to regulate Indian affairs is limited to the Commerce Clause, but, in any case, the defendants' position flies in the face of a basic canon of construction of organic law. There is no support for it in the cases; in fact, quite the contrary, *e. g., Oliphant v. The Suquamish Indian Tribe,* —— U.S. ——, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). In my opinion, the 1790 date is entirely without significance in this case.

The plaintiff insists that 1869 and 1870 are crucial dates. Since the jury's return the defendants have enthusiastically joined in this position. If the proprietors of Mashpee were a tribe in 1870, the common land held by the District of Mashpee would very likely be tribal land, and its division

or sale pursuant to the statute of 1870 might well have been a violation of the Nonintercourse Act. In my opinion, 1870 is significant with respect to approximately three thousand acres[5] of the former common land, but not in any other respect.

With respect to the allotted land, however, the 1869 statute was in effect a release by the successor of the original grantor of a restraint on alienation included in the 1685 deed from the General Court of the Plymouth Colony. It might also be perceived as the grant of a right of free alienation, but it was a grant that flowed *to* the Indians not *from* the Indians. It flowed not to an Indian nation or tribe of Indians, but to individual Indian holders of estates in fee. It is only a "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians," that is invalidated by the Nonintercourse Act. None of these occurred in 1869, and 1869 is therefore not a significant date.

The statute of 1842 in contrast, did bring about a basic change in the title to the land in Mashpee. Common land was converted by operation of the statute into land held in severalty. If, as the jury determined, the proprietors constituted an Indian tribe at this time, what I assume was tribal land was perforce conveyed to individual Indians. The plaintiff does not wish this to be considered a critical date, because if it is, the operation of the Nonintercourse Act invalidates the title of the Indians themselves, some of whose present titles doubtless derive directly from the original proprietors. (Other present-day Indians own land in Mashpee which they bought from non-Indians; their title is, of course, no better than that of the non-Indians in their chain of title.) The Nonintercourse Act does not by its terms provide for any exception for the conveyance of land from a tribe to individual Indians, and plaintiff has cited no

[5] The location of these acres was not revealed in any evidence adduced at this stage of the case.

case creating a judicial exception. 1842, therefore, is a significant date.

The 1834 Act presages the 1842 disposition of the land, while it provides for permanent, transferable rights of use and occupancy, it does not, strictly speaking, affect title. Use and occupancy are interests in land nevertheless, and 1834 may be a significant date to that extent. There was some evidence that allotment of tribal land for the use and occupancy of particular families was characteristic of tribally held land and not inconsistent with tribal title. Whatever significance the 1834 Act may have had seems to me to have been subsumed in the 1842 statute.

The significant dates are therefore 1976 and 1842, and 1870 as to approximately three thousand unidentified acres.

III. Inconsistency of Responses and Confusion of Jury

Plaintiff's attack on the jury's finding that it was not a tribe in August of 1976 is not based on the evidence adduced with respect to 1976, but on the assertion that the pattern of the jury's other answers fatally impeach that finding. The argument has two branches:

1. There was no material change in the circumstances of the Mashpee proprietors between 1842 and 1869 which warrants the jury's finding that they were a tribe in 1842 and were not in 1869. Since I had instructed the jury that tribal status once abandoned could not be regained, the mistake with reference to 1869 required a negative answer with respect to 1976. Thus the answer with respect to 1976 cannot be the basis of a judgment adverse to the plaintiff.

2. The finding of the jury that the proprietors were not a tribe in 1790 is inconsistent with the finding that they were a tribe in 1834. Plaintiff claims that the instructions limited the time for the emergence of a tribe to the period before 1723. The proprietors would not

therefore have become a tribe between 1790 and 1834. The finding thus reflects either a misunderstanding of the instructions, or a refusal by the jury to abide by them, either of which vitiates all of the jury's answers including the answer that the plaintiff was not a tribe when the suit was commenced in 1976.

IV. Opinion

In my view, the evidence would support the jury's finding that between 1842, when the Indians in Mashpee were active in establishing self-determination and asserting their right to their own customs, and 1869 when the legislative hearing was held, the proprietors had reoriented their efforts toward assimilation into the general non-Indian community. This is arguably the tenor of the 1869 statements, the differences between the speakers involving only the timing of the proposed changes. (Plaintiff's Exhibit 180.) I instructed the jury that they could also consider the events of the immediately prior and succeeding years in evaluating the situation at any one of the given dates, insofar as they bore on the attitude and customs of the Indians. The absence of any indication of Indian self-identification, or of the establishment of tribal common land in the years immediately following 1869, at a time when the Indians exercised virtually complete control of the area, may have had some bearing on the jury's response. From all of the circumstances, the jury was entitled to find that tribal identity had been abandoned at some time between 1842 and 1869.[6]

The basis of the plaintiff's argument with respect to 1790 is the following section of the original instructions to the jury:

> You may also consider whether the group started off in 1665 as a mere remnant or an accumulation of Indians from here and there and acquired a tribal status by reason of organizing itself in a tribal manner, somewhere in the course of time between 1665 and 1723. [Tr. 40-53, l. 1-6]

[6] These various instructions, including the instruction that tribal status may be abandoned, are challenged by the plaintiff as a matter of law, but I have in effect already ruled on these matters.

The plaintiff treats this statement as a limitation. It seems to me that the word "also" defeats that interpretation, but the lack of further amplification certainly left the matter unclear at that point.

Unfortunately, during the long colloquy with counsel after the instruction, confusion was compounded by my contradictory statements regarding the foregoing, neither of which were correct statements of the applicable rule. [Tr. 40-107, l. 1-2; Tr. 40-86, l. 8-13.] Fortunately, these statements were out of the presence of the jury, and could not have affected their answers.

In any case, the supplementary instructions permitted the jury to find the evolution of a tribal organization occurred at any time "in their course of history." [Tr. 41-17, l. 16 through 41-18, l. 11.] This answers the plaintiff's objection.

There remains yet one more ambiguity in the jury's 1790 answer, however, which should be pointed out, even though in my opinion it is of no consequence. The 1790 date falls just after the imposition of guardians under the statute of 1788. I advised the jury that an involuntary repression of tribal activity would not constitute an abandonment of tribal existence, but I did not say how they should answer if they found that such repression did exist; *i. e.*,

> *Yes* (there was a tribe, but it was unable to function)
>
> or
>
> *No* (There was not a functioning tribe for the time being)

The jury's actual negative answer is therefore susceptible to two interpretations:

(1) That the tribe did not evolve until sometime after 1788.

(2) That the tribe had evolved sometime prior to 1788, but was in temporary eclipse because of the guardianship.

On the evidence the latter is the more likely conclusion, but there is no way of telling what the jury thought.

In my considered view, it doesn't matter, because as I have said, 1790 is in my opinion a totally irrelevant date. The answers of the jury are perfectly rational under either view, and do not reflect such lack of understanding or lack of compliance with the instruction as to vitiate the remaining answers.

Aside from all of these problems, the answer of the jury that the plaintiff was not a tribe for purposes of the Non-intercourse Act[7] in 1976 was fully supported by the evidence of the circumstances of the plaintiff's existence in Mashpee at that time.

V. Order

Accordingly, the answers of the jury to the special interrogatories shall stand. These answers require that this action be Dismissed on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe.

So Ordered.

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[7] The standards of that Act, at least as I have interpreted it, require that a tribe demonstrate a definable organization before it can qualify for the extraordinary remedy of the total voiding of land titles acquired in good faith and without fraud. Nothing herein, or in the answers of the jury, should be taken as holding or implying that the Mashpee Indians are not a tribe for other purposes, including participation in other federal or state programs, concerning which I express no opinion.

Memorandum and Orders on Various Motions

1. *Plaintiff's Motion for Entry of Findings*

The entry of findings requested by the plaintiff are inappropriate in view of the jury's answers to special interrogatories. Moreover, the subject of land title was reserved as a matter of law rather than of fact, given the undisputed documentary evidence and the jury's answers. Insofar as presently material, my conclusions of law are embodied in the accompanying memorandum on the defendants' motion for judgment. Plaintiff's motion is accordingly Denied.

2. *Defendants' Motion for a Directed Verdict—the White Settlement Exception*

I am of the opinion that the so-called white settlement exception does not apply to alienation of tribal land, for the reason stated in *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 808-809 (D.R.I.1976), and also for the reason that the underlying policies of the act insofar as it relates to land, i. e., (1) to keep peace with the Indians, and (2) to prevent the Indians from becoming homeless charges, would apply with equal force to tribes surrounded by white settlements as to any other tribes.

It should be noted for purposes of this motion, that the evidence is undisputed that by the early eighteenth century the communities surrounding Mashpee had been substantially settled by non-Indians and had been incorporated as the towns of Falmouth, Sandwich and Barnstable.

In view of my reading of the statute, however, defendants' motion for a directed verdict is Denied.

427 F.Supp. 899 (1977)

MASHPEE TRIBE, *Plaintiff*,

v.

NEW SEABURY CORP. et al., *Defendants*.

Civ. A. No. 76-3190-S.

United States District Court, D. Massachusetts.

February 28, 1977.

Memorandum and Order On Motion To Dismiss

SKINNER, District Judge.

This case came before me on January 24, 1977, for a hearing on the defendant Town of Mashpee's (hereinafter, the Town) motion to dismiss.

This is a defendant class action (see Memorandum and Order of January 21, 1977) in which the Mashpee Tribe (hereinafter, the Tribe) seeks a declaration of its right to possession of certain land in the Town of Mashpee, "excepting, however, any portion of the subject land which constituted the actual site of the principal place of residence of any individual as of the time of commencement of this action." The plaintiff seeks to be restored to possession of the land, other than principal residences, and a declaration that it is entitled to the fair rental value of any land continuing in the possession of any defendant after entry of final judgment in the action.

The Tribe claims that all of the land it seeks was alienated from the Tribe in violation of the Indian Nonintercourse Act. 25 U.S.C. § 177.[1] This Act states, in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The purpose of this statute has been declared to be "to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties. . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S.Ct. 543, 555, 4 L.Ed.2d 584 (1960).

This court has subject matter jurisdiction of this claim under 28 U.S.C. § 1331. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

The motion to dismiss rests on three asserted grounds: (1) that by failing to allege official recognition, the Tribe has failed to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6); (2) that the Tribe has failed to join the United States as an indispensable party, Fed.R.Civ.P. 12(b)(7) and 19; and (3) that the Tribe has failed to join the Commonwealth of Massachusetts as an indispensable party, Fed.R.Civ.P. 12(b)(7) and 19.

Motion to Dismiss under Fed.R.Civ.P. 12(b)(6)

The elements of a prima facie case demonstrating that § 177 covers the land in question have been set forth in

[1] The Indian Nonintercourse Act was first adopted, in a form substantially the same as it now appears, on July 22, 1790, 1 Stat. 137. It was subsequently reenacted several times: 1793, 1 Stat. 329; 1796, 1 Stat. 469, 472; 1799, 1 Stat. 743, 746; and made permanent in 1802, 2 Stat. 139, 143, now appearing at 25 U.S.C. § 177.

Narragansett Tribe of Indians v. So. R.I. Land Develop., 418 F.Supp. 798 (D.R.I.1976) (hereinafter, *Narragansett*), as follows:

> . . . plaintiff must show that:
>
> 1) it is or represents an Indian "tribe" within the meaning of the Act;
>
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
>
> 3) the United States has never consented to the alienation of the tribal land;
>
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

418 F.Supp. at 803; *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), *aff'g*, 388 F.Supp. 649 (D.Me.1975) (hereinafter *Passamaquoddy*).

The Town singles out the first of these elements as having been defectively alleged. It claims that the plaintiff must plead that it is "recognized" as a tribe by Congress or its delegate. Absent such an allegation, says the Town, this court is faced with a non-justiciable political question.

This argument is virtually identical to one raised by defendants and rejected in a carefully reasoned memorandum in *Narragansett, supra* at 813-815. As in that case, none of the elements which would constitute a non-justiciable political question as set forth in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), are present here.[2]

Recognition as a tribe by the executive branch of government, while it would be relevant in determining whether a

[2] See also *Delaware Tribal Business Committee v. Weeks*, —— U.S. ——, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977).

group is a tribe under the Indian Nonintercourse Act, is not necessary to such a determination. *Passamaquoddy, supra* at 377-378; *Narragansett, supra* at 813-815. Indeed, recognition as a tribe by Congress or its executive delegate may not even be *sufficient* to bring a group within its authority if a court, "[a]ble to discern what is 'distinctly Indian,'" strikes down a heedless or arbitrary extension of the label. *Baker v. Carr, supra* 369 U.S. at 215-217, 82 S.Ct. at 710. As *Passmaquoddy* pointed out, "[t]here is nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized." *Passamaquoddy, supra* at 377.

Once Congress has determined, as it did here, to include tribes generally within the coverage of an act, *Passamaquoddy, supra*, a court is competent to determine whether a given aggregate of individuals constitutes a tribe. *Narragansett, supra; see United States v. Washington*, 520 F.2d 676 (9th Cir. 1975, *cert. denied*, 424 U.S. 978, 96 S.Ct. 1487, 47 L.Ed.2d 750 (1976). The applicable (and "judicially manageable") standard for such a determination is to be found in the definition of "Indian tribe" in *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901), and the cases in which that definition has been applied.

A "tribe", according to *Montoya*, is:

> . . . a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory.

Montoya, supra, quoted, *e. g., United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *Passamaquoddy, supra* at 377, n. 8; *Narragansett, supra* at 815. In *Candelaria, supra*, the Supreme Court found the Pueblos to be a tribe within the terms of this definition, thus overruling a contrary result in *United States v. Joseph*,

94 U.S. 614, 24 L.Ed. 295 (1876), but leaving intact an additional standard suggested in *Joseph*: that the tribe for purposes of the Nonintercourse Act consists of "simple uninformed people." A tribe may thus be so sophisticated or assimilated as to fall outside of the scope of protection afforded by the Nonintercourse Act. *Passamaquoddy, supra* at 378 (dictum); *see Candelaria, supra; Joseph, supra; cf. The Kansas Indians,* 5 Wall. (72 U.S.) 737, 755-757, 18 L.Ed. 667 (1866); *United States v. Cisna,* 25 Fed.Cas.No. 14,795 422 (C.C.D. Ohio 1835).

The Tribe has then sufficiently alleged its status. Whether it meets the criteria for protection under the Nonintercourse Act is a question of fact which is susceptible of proof like any other. Accordingly, the Town's motion to dismiss under Rule 12(b)(6) is DENIED.

Motion to Dismiss for Failure to Join the United States

The Town seeks to have the United States joined under Rule 19(a) if it has waived sovereign immunity, but if not, it seeks to have the action dismissed for failure to join an indispensable party under Rule 19(b).

It is well established that a tribe may sue on its own behalf to protect its rights in real property without the participation of the United States as a plaintiff. *E. g., Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed. 2d 1238 (1968) (involving individual Indian); *Creek Nation v. United States,* 318 U.S. 629, 63 S.Ct. 784, 87 L.Ed. 1046 (1943); *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 39 S.Ct. 185, 63 L.Ed. 504 (1919); *Chocktaw & Chickasaw Nations v. Seitz,* 193 F.2d 456 (10th Cir. 1951) *cert. denied,* 434 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952); *Narragansett, supra; see Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 472-473, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Oneida Indian Nation v. County of Oneida,* 464 F.2d 916, 919 n. 4 (2d Cir. 1972), rev'd on other grounds, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

It is also well established that the United States would not be bound by a result in this action adverse to the Tribe. *United States v. Candelaria, supra; see also, Poafpybitty, supra* 390 U.S. at 371, 88 S.Ct. 982; *Fort Mojave Tribe v. Lafollette,* 478 F.2d 1016 (9th Cir. 1973); *Seitz, supra; Narragansett, supra* at 810.

Under these circumstances, as the parties agree, the United States would be a proper party for joinder under Rule 19(a) if it had waived sovereign immunity. It has not done so. The general consent to suit against the United States in civil actions to adjudicate disputed title where the United States claims expressly excludes actions, like the one at bar, which involve "trust or restricted Indian lands".

The Town relies on *United States v. Phillips,* 362 F.Supp. 462 (D.Neb. 1973), for the proposition that where it has not been *determined* that land is "trust or restricted Indian lands", the United States has effectively waived sovereign immunity in § 2409a. The major ground in *Phillips* for finding a waiver, however, was that the United States brought the action to quiet title in the first place and had thus waived immunity with respect to the very issues raised in a counterclaim by the defendant to quiet title. There is no basis for extending the waiver to an action which the United States has not voluntarily initiated. Such an extension would violate both the requirement that a statutory waiver of sovereign immunity be strictly construed, *Nickerson v. United States,* 513 F.2d 31, 33 (1st Cir. 1975), and the rule that ambiguities in statutes relating to Indians should never be construed to the Indian's prejudice. *Passamaquoddy,* 528 F.2d at 380.

Since the United States may not be compelled to join in this action, the question becomes whether in equity the action ought to be dismissed under Rule 19(b). Courts have consistently followed the lead of *Seitz, supra,* in refusing to rule that the United States is an indispensable party where the Indians sue to enforce federally protected rights.

E. g., Poafpybitty, supra; Fort Mojave Tribe v. Lafollette, supra; Narragansett, supra.

The Town argues, however, that one important factor contributing to the results in those cases has since disappeared, because Indians now have an adequate alternative remedy in the event of a dismissal.

Contrary to the assertion of the Town, *Passamaquoddy, supra,* does not give a tribe the right to compel the United States to bring suit to recover possession for the Tribe. That case stands only for the power of the court to review a refusal by the United States to bring an action on behalf of a tribe where the refusal rests solely on the ground that a fiduciary relationship does not exist. *See Passamaquoddy,* 388 F.Supp. at 664-666.

The Town also asserts that *Edwardsen v. Morton,* 369 F.Supp. 1359 (D.D.C.1973), describes an alternative remedy available to Indians. The case is inapposite in that it deals with liability for specific affirmative action alleged to be in violation of the government's fiduciary duty over land formerly under the direct control of the Department of the Interior. The case teaches nothing about the right of Indians to require the United States or its representatives to enforce claims against third parties in its fiduciary capacity.

The availability and nature of such direct relief is too doubtful to warrant dismissal under Rule 19(b). *See generally,* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 Stan.L.R. 1213 (1975).

Accordingly, the Town's motion to dismiss for failure to join the United States as an indispensable part is DENIED.[3] *Seitz, supra; Narragansett, supra.*

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[3] The United States is, however, invited to intervene as it has been in *Narragansett,* 418 F.Supp. at 810-811.

Motion to Dismiss for Failure to Join Massachusetts

The Town asserts that the Commonwealth may hold a superior claim to defendants in this action if the Tribe proves that the Nonintercourse Act applies to the subject land. On that basis, the Town seeks joinder of the Commonwealth under Rule 19(a) if it has waived sovereign immunity and dismissal under Rule 19(b) if not.

The Tribe's claim, however, is to possessory rights, or rights of occupancy, as against defendants now keeping the Tribe out of possession. *See Oneida Indian Nation v. County of Oneida,* 414 U.S. at 667, 94 S.Ct. 772. The existence of any rights in fee in the Commonwealth would be contingent upon the Tribe's success in its claim and on the Commonwealth showing it had not transferred its rights. *See Fellows v. Blacksmith,* 19 How. (60 U.S.) 366, 15 L.Ed. 684 (1856). Lack of resolution of such an issue will not prevent there being complete relief among those already parties concerning possessory rights. Nor will it subject any parties to a substantial risk of incurring inconsistent obligations as to possession or practically impair the Commonwealth's ability to protect its interest. Thus, there is no ground for attempting to join the Commonwealth under Rule 19(a), nor, of course, is it an indispensable party under Rule 19(b). Accordingly, the Town's motion to join Massachusetts under Rule 19(a) or to dismiss under Rule 19(b) is DENIED.